No. 87-658

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

W. KENNETH ROSS and
CAROLE A. ROSS
Appellants,

VS.

THE CITY OF ROLLING HILLS ESTATES, An Incorporated City, THE PLANNING COMMISSION OF THE CITY OF ROLLING HILLS ESTATES AND THE CITY COUNCIL OF THE CITY OF ROLLING HILLS ESTATES,
Appellees.

Appeal From
Court of Appeal of California
Second Appellate District, Division Four

JURISDICTIONAL STATEMENT

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Questions Presented

1. Has California Permitted The City of Rolling Hills Estates, California To Violate Appellants' Federal Due Process Rights By Holding That The View Protection Ordinance Is Constitutional?

2. Have Appellants' Federal Due Process Rights Under The Fifth And Fourteenth Amendments To The U.S. Constitution Been Violated By The View Protection Ordinance's Improper Delegation Of Authority?

3. When Local Government Regulates Private Property In Such A Way As To Substantially Decrease The Use To Be Made Of And The Value Of The Private Property, Has The Property Been Taken Within The Meaning Of The Fifth And Fourteenth Amendments To The U.S. Constitution?

PARTIES

The caption of the case in this Court contains the names of all parties to the proceeding in the California Court of Appeal.

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the Court of Appeal [App. C] was published at 192 Cal.App.3d 370. The California Supreme Court, in bank, denied review [App. H].

JURISDICTION

Since 1984, appellants W. Kenneth Ross and Carole A. Ross have sought to build an addition to their home in the City of Rolling Hills Estates, California (the City). The Rosses submitted their building plans to the City, but

were denied a building permit based on the City's finding that the Rosses' proposed residential addition violated the City's View Protection Ordinance (VPO).

The Rosses challenged the constitutionality of the VPO under the California and United States Constitutions through a petition for writ of mandamus [App. A], which was denied in a minute order opinion. [App. B] On appeal, the California Court of Appeal affirmed the denial of the petition for writ of mandate and held that the VPO was constitutional. [App. C] Appellants' Opening and Reply briefs are reproduced in Appendices D and E, respectively. The Court of Appeal further ordered that the opinion not be published in the Official Reports. On June 1, 1987, following appellants' request therefor, the California Court of Appeal ordered that its opinion be published in the Official Reports. [App. F]

The Court of Appeal refused to consider appellants' claim in their Reply Brief that the City's action constituted a taking without just compensation in violation of the Fifth Amendment to the U.S. Constitution.

A timely Petition for Review was filed in the California Supreme Court [App. G] and on July 29, 1987, the California Supreme Court denied review. [App. H] In so doing, the California Supreme Court ignored appellants' federal constitutional arguments under the Fifth and Fourteenth Amendments to the U.S. Constitution.

A timely Notice of Appeal to this Court was filed September 16, 1987. [App. I]

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(2) because a local, municipal ordinance was challenged as violating the U.S. Constitution and the ordinance was upheld.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, United States Constitution:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, United States Constitution:

> "Section 1 . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

The Rolling Hills Estates Municipal Code, Sections 1950-1956 (VPO) is reproduced in Appendix J.

RAISING THE FEDERAL QUESTION

The Petition for Writ of Mandamus, appellants' Opening and Reply Briefs in the California Court of Appeal and appellants' Petition For Review in the California Supreme Court alleged the federal constitutional invalidity of the VPO. Further, at oral argument at the hearing on Appellants' Petition for Writ of Mandamus, the trial court and opposing counsel specifically referenced this Court and its opinion in *Village of Belle Terre v. Boraas* (1974) 416 U.S. 1. *See* Reporter's Transcript on Appeal herein [App. K1, 7-10, 15, 29]. References to the constitutional challenges to the VPO are found in the Petition [App. A5-10, 34-37], the trial court opinion [App. B5-6] the opening brief [App. D5-12], the Reply Brief [App. E1-5, 9] and the Petition for Review [App. G4-11].

Appellants' Reply Brief in the Court of Appeal and their Petition for Review in the California Supreme Court raised the VPO as a taking of private property for public use without just compensation in violation of the Fifth

and Fourteenth Amendments to the U.S. Constitution. These federal Constitutional questions were, thus, raised at the earliest possible time and reiterated in all trial and appellate briefs dealing with these claims. Under the authority of *New York ex. rel. Bryant v. Zimmerman* (1928) 278 U.S. 63, 67, appellants have adequately raised the federal question.

STATEMENT OF THE CASE

This case involves a case of first impression. Appellants sought in 1984 to obtain a building permit to structurally alter their home in Rolling Hills Estates, California in order to increase their residential living space. In 1985, the City denied them a building permit based upon the finding that appellants had violated the VPO by proposing a home addition which would obstruct the views of two of appellants' uphill neighbors.

Proceeding by way of mandamus, appellants sought, *inter alia,* a ruling invalidating the VPO on the grounds that it is so vague and ambiguous as to violate due process of law. The trial court denied appellants' petition for writ of mandate and specifically declined to rule on the constitutionality of the VPO. [App. B]

The Court of Appeal affirmed, holding that the VPO passed constitutional muster, even in the face of the argument that it violated the Fifth Amendment because it constituted a taking of private property without just compensation. [App. D9]

The California Supreme Court denied review, declining one of its first opportunities to apply this Court's holdings in *Nollan v. California Coastal Commission* (1987) 483 U.S. ____, 97 L.Ed.2d 677 (Nollan) and *First English Evangelical Lutheran Church of Glendale v. L.A. County* (1987) 482 U.S. ____, 96 L.Ed. 2d 250 (First English) to

a case involving very similar issues, even though these two cases were analyzed and argued in appellants' Petition for Review.

Notice of Appeal to this Court was timely filed September 16, 1987 in the California Court of Appeal, Second Appellate District, Division Four. [App. I]

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Introduction

Twice since June, 1987, this Court has held that California's treatment of the rights of property owners is in violation of the United States Constitution. *Nollan, supra,* and *First English, supra.* In each case, this Court held that: (1) the California courts' arrogance in their treatment of the rights of property owners can no longer be tolerated and (2) said courts' ignorance of what the federal constitution requires before a person may be deprived of his property has worked severe injustices. In *Nollan,* Justice Scalia writes in reference to the building permit condition imposed on the homeowner appellants therein:

> In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but "an out-and-out plan of extortion." (citations omitted).

Id. at 97 L.Ed.2d 689.

In *First English,* Chief Justice Rehnquist quotes Justice Holmes in emphasizing the need to recognize and protect the rights of property owners by stating:

> [A] strong public desire to improve the public condition is not enough to warrant achieving the desire by

> a shorter cut that the constitutional way of paying for the change. (citation omitted).

Id. at 96 L.Ed.2d 268.

The California Supreme Court, in refusing to grant review of appellants' Petition, is following a line of cases of which *Agins v. City of Tiburon* (1979) 24 Cal.3d 266, *aff'd on other grounds* (1980) 447 U.S. 225, is probably the most prominent, even though this authority has been expressly overruled. The California high court has refused to grant a hearing in the first case to come before it wherein the unconstitutional excesses, vagueness and unfairness present in a local view protection ordinance have resulted in both the denial of federal due process rights to appellants and a taking of their property without just compensation.

The California Supreme Court's pursuit of this course of judicial action is responsible for Justice Cole's comments in the Court of Appeal decision holding the VPO constitutional, *i.e.*:

> While not itself a zoning ordinance, the view protection ordinance is closely related. "[A] substantial amount of vagueness is permitted in California zoning ordinances" in order to permit delegation of broad discretionary power to administrative bodies. (*Novi v. City of Pacifica* (1985) 169 Cal.App.3d 678, 682 [215 Cal.Rptr. 439]; and see *Piano v. State of California ex rel. New Motor Vehicle Bd.* (1980) 103 Cal.App.3d 412, 418 [163 Cal.Rptr. 41]. The ordinance at issue passes muster.

[App. C8]

There will be no change in California's treatment of its citizens' property rights so long as the Courts of this state advocate and encourage vague, sloppy and ambiguous language in laws aimed at defining, explaining and

regulating the use which can be made of private property. Property rights will sink lower and lower in priority in this state when the lyrics of a songwriter can form the basis for precluding development of private property.[1] Property owners will be forced to court their neighbors' approval in order to be able to engage in residential development that otherwise complies with all applicable zoning laws.

In face of such consistent abuse by California of federally-protected constitutional rights, the need for review of an ordinance which: (1) is so vague as to deny federal due process rights, (2) is a tool to permit an improper and unconstitutional delegation of power to appellants' neighbors, *Washington ex rel Seattle Title Trust Company v. Roberge* (1928) 278 U.S. 210, and (3) is enforced and applied to work a taking of private property without just compensation, has *never* been more pressing.

CALIFORNIA HAS PERMITTED APPELLANTS' FEDERAL DUE PROCESS RIGHTS TO BE VIOLATED BY HOLDING THAT THE VIEW PROTECTION ORDINANCE IS CONSTITUTIONAL

The California Supreme Court's refusal to grant review of the California Court of Appeal decision herein has the effect of finding that the VPO does not violate any of appellants' federal due process rights. Such a decision was expected given California's demonstrated refusal to uphold virtually any challenge by a landowner to a governmental zoning or land use regulation irrespective of its effect on individual property rights. See *Patterson v. Central Coast Regional Commission* (1976) 58 Cal.App.3d

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[1]In *Novi v. City of Pacifica, supra*, the Court of Appeal based its decision to deny a building permit to a developer of low cost housing in great part on the lyrics of the song "Little Boxes" by Malvina Reynolds!

833; *Marina Plaza v. California Coastal Zone Conservation Commission* (1977) 73 Cal.App.3d 311; *Donlan v. Weaver* (1981) 118 Cal.App.3d 675; *Remmenga v. California Coastal Commission* (1985) 163 Cal.App.3d 623; *Grupe v. California Coastal Commission* (1985) 166 Cal.App.3d 148; *Paris v. Community Redevelopment Agency* (1985) 167 Cal.App.3d 489; *Sagaser v. McCarthy* (1986) 176 Cal.App.3d 288. So certain are attorneys in this state of the futility of challenging residential land-use regulations that the attorney for the City did not even file an opposition to appellants' Petition for Review in the California Supreme Court. This judicially-approved, anti-property-rights state of mind is improper and violates personal property rights under the Fifth and Fourteenth Amendments.

The VPO's stated purpose is to promote the health, safety and general welfare of the public by protecting the City's views. Mun. C., section 1950. [App. J] The VPO provides for a process of design review when a City zone clearance official determines that there would be "significant visual impact to those living adjacent to the development." Mun. C., section 1951. Nowhere, however, is the term significant visual impact defined. Nowhere in the VPO are specific criteria enumerated to provide an objective standard for the required review process. And nowhere in the VPO is there any semblance of a roadmap to guide a homeowner relative to what he can or cannot do in adding to or remodelling his property. These are the flaws which make the City's actions in the present case so flagrantly violative of the Rosses' federal due process rights.

In the Court of Appeal decision, Justice Cole writes relative to the tests employed in an analysis of whether a law is unconstitutionally vague:

> The language used in such legislation "must be definite enough to provide a standard of conduct" for those whose activities are prescribed as well as a standard by which the agencies called upon to apply it can ascertain compliance therewith. [Citation.]

[App. C 6]

The requirement of "definiteness" has proven troublesome to many legislative agencies.[2] It is, however, the watchdog standard in federal due process rights in this area and must be observed. When a city disregards this constitutional directive, the Courts must and do step in.

In *West Palm Beach v. State ex rel. Duffey,* 158 Fla. 863, 30 So.2d 491 (Sup. Ct. Fla. 1947), the Supreme Court of Florida held invalid as unconstitutionally vague an ordinance of West Palm Beach which required that:

> [T]he completed appearance of every new building or structure must *substantially equal* that of adjacent buildings or structures in said subdivision in appearance, square foot area and height. (emphasis added).

Id. at 30 So.2d 492.

The Florida high court stated that the ordinance imposed a standard which was uncertain and which left determination to the whim and caprice of the administrative agency. The infirmities present in the *West Palm Beach* ordinance are equally present here. The vagueness

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[2]One author has noted that the most troublesome problem encountered in municipal attempts to control architectural design is the articulation of standards which meet the aesthetic needs of the community and satisfy legal requirements. Anderson, *Architectural Controls,* 12 Syracuse L. Rev. 26, 44 (1960).

which results in a denial of a citizen's federal due process rights and which has been denounced by this Court and the federal courts in such cases as *Grayned v. City of Rockford* (1972) 408 U.S. 104; *Papachristou v. City of Jacksonville* (1972) 405 U.S. 156; *Coates v. City of Cincinnati* (1971) 402 U.S. 611; *Giaccio v. State of Pennsylvania* (1965) 382 U.S. 399; *Ricks v. United States* 414 F.2d 1111 (D.C. Cir. 1968); *United States v. Eastern Air Lines, Inc.* 192 F.Supp. 187 (S.D. Fla. 1961), should be held to void the VPO.

The VPO is arguably an attempt to promote the quality of life for the citizens of Rolling Hills Estates. Laudable goals and California judicial approval thereof can never justify improper means of attaining them. *First English,* 96 L.Ed.2d 268. Yet, because we are not dealing with fundamental rights such as freedom of speech or religion, California has chosen to affix its stamp of approval onto virtually any local governmental attempt to regulate zoning and property development, irrespective of the wording or effect. In so doing, California has ignored this Court's instruction that property rights are as much personal, civil rights as the right to speak or travel, *Lynch v. Household Fin. Corp.* (1972) 405 U.S. 538, 552, and "[o]f the aggregate rights associated with any property interest, the right of use of property is perhaps of the highest order", *Dickman v. Commissioner* (1984) 465 U.S. 330, 336.

Pacesetter Homes, Inc. v. Village of Olympia Fields, 244 N.E. 2d 369 (App. Ct. Ill. 1968) was a case which proceeded on virtually identical theories as the one at bar and involved a village ordinance which created an architectural advisory committee and granted said committee declaratory powers with respect to the issuance of building permits. Said ordinance specified various criteria to be applied in judging whether the proposed construction

violated the ordinance. Such criteria gave the advisory committee "wide discretion in determining which applications will be allowed and which will be disallowed." *Id.* at 372.

The Illinois Court of Appeal held that the ordinance failed to prescribe adequate standards to control the actions of the advisory committee in determining which applications would be approved and conferred too broad a discretion on said adivsory committee. *Id.* at 373. The ordinance was invalidated under the constitutions of the United States and the State of Illinois and the Village of Olympia Fields was enjoined from enforcing said portions of the ordinance against the plaintiff.

Appellants herein seek the same result for the same reasons and are not alone in attacking an aesthetic ordinance on constitutional grounds. *See, e.g., Bachman v. State,* 359 S.W.2d 815 (Sup. Ct. Ark. 1962); *Mayor & City Council v. Mano Swartz, Inc.,* 299 A.2d 828 (Md. Ct. App. 1973); *City of Jackson v. Bridges,* 139 S.2d 660, 664 (Sup. Ct. Miss. 1962); *City of Scottsbluff v. Winters Creek Canal Co.,* 53 N.W.2d 543, 547 (Sup. Ct. Neb. 1952); *Little Pep Delmonico Restaurant, Inc. v. City of Charlotte,* 113 S.E.2d 422 (Sup. Ct. N.C. 1960); *City of Norris v. Bradford,* 321 S.W.2d 543 (Sup. Ct. Tenn. 1958). *See also Farley v. Graney,* 119 S.E.2d 833 (Sup. Ct. App. W. Va. 1960) (general validity of ordinance recognized but specific application held to be aribtrary and capricious).

Appellants implore this Court to take a constitutional scalpel to the VPO and cut through the commendable reasons for upholding it so as to flesh out those provisions where the boundaries of discretion and the form of remedy for the homeowner are to be found. Such surgery reveals the cancer in that the boundaries of the City's discretion are unlimited.

In this case, if a citizen says his view will be blocked by even as little as 8%,[3] the homeowner loses. If a court then urges the City to agree to accept a previously compromised position, the City responds by: (1) ignoring such judicial recommendation and (2) amending the ordinance in question[4] By such action, the City, acting through its elected officials, deftly avoids having to deal with a vocal critic who is perceived as unpopular among such officials' constituents.[5]

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[3]Based upon the appellees' markings on photographs taken of the Crawfords' view (the Rosses' "view impacted" neighbors), (App. A22], appellants calculated that such view would be affected by only about 8%.

[4]Judge Gorenfeld in his Conclusion to his trial court Memorandum Opinion stated:

However, I would advise Mr. and Mrs. Ross to approach this problem with the feeling that the City Council is attempting, in good faith, to resolve the conflicting interests involved in this case. Can the Petitioners live with the recommendation of the Planning Director:

> That the Council stipulate as mitigating measures that the plans be revised to reduce the maximum height of the addition to 22'6" and that no second story be permitted over the garage.

[App. B6]

Contrary to the trial Court's "suggestion," the City never made this option available to the Rosses. Shortly after the City denied the Rosses their building permit, Mun. C. section 1816, a new, more all-encompassing aesthetic set of regulations to be applied along with the VPO, was enacted by the City. The City has used this new ordinance, albeit improperly, to avoid working out a compromise with appellants. [App. D13-15]. This tactic renders meaningless the stated purpose of the VPO's design review process: to "coordinate and conciliate to the maximum extent possible the resolution of disputes among property owners concerning view obstructions." Mun. C. Section 1955(c).

[5]Eighty percent (80%) of the residents of appellants' neighborhood (Marloma) signed a petition opposing appellants' building proposal. Such petition totally mischaracterized what the proposed addition

Wholly apart from being unconstitutionally vague, the VPO is in direct conflict with Mun. C. section 1823(f), which is entitled "Maximum Building Height" and provides:

> No building or structure erected in this district shall have a height greater than thirty-five (35) feet or two (2) stories.

Appellants complied with this height restriction in their proposed addition. One writer in this area has concluded and emphasized that view preservation is little more than a matter of setting clear height limitations.[6] Appellees obviously disagree and have interjected into what should be a simple mathematical determination, a veritable multitude of personal, undefined aesthetic considerations which do nothing but pit the majority against the minority.

Appellants' permit application was denied based upon factors having nothing to do with whether their proposed addition blocked anyone's view. The Rosses lost because the VPO's wording permits virtually any interpretation and appellants' neighbors were successful in exploiting this ambiguity to their advantage. Query, would the VPO have passed constitutional muster if Mun. C. section 1951(c) read: Minimize the appearance of "ethnically"

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would involve and what views it would affect. The City received this petiton and, based on its actions, sided with the majority in violation of appellants' rights. [App. A26-27]

[6]In Note, *Beyond the eye of the Beholder: Aesthetics and Objectivity*, 71 Mich. L. Rev. 1438, 1452 (1973), the author analyzes what someone's view really includes:

> "Maximum height limitations preserve the skyline of a city, as well as provide light and air for the inhabitants. Since these requirements are normally set out in terms of specific measurements, their application should present no subjective difficulties."

intrusive structures? Probably not, yet the broad language of the VPO allows the majority to strictly control and restrict all building that it dislikes for whatever reason. The VPO's language effectively permits the City to take appellants' property without giving them any due process rights. The VPO should be declared to be in violation of the U.S. Constitution.

Appellants' Federal Due Process Rights Under The Fifth And Fourteenth Amendments To The U.S. Constitution Have Been Violated By The VPO's Improper Delegation Of Authority

The due process clause of the Fifth and Fourteenth Amendments prohibits the delegation of power uncontrolled by any standard or rule prescribed by legislative action. *Washington ex rel. Seattle Title Trust Co. v. Roberge, supra.* It further prohibits a zoning classification or permit scheme which is facially valid to be applied in an unconstitutional fashion. *J.W. v. City of Tacoma, Washington,* 720 F.2d 1126 (9th Cir. 1983). Both of the above, prohibited evils are present in this case.

Upon a finding of view impairment, the VPO requires that the City Planning Commission strive to obtain a compromise amongst the property owners. Mun. C., section 1955(c). While appearing to encourage settlement and compromise, in this case such wording is applied in such a way as to repose almost all power to say "yea" or "nay" to a building permit applicant in the Marloma Homeowners Architectural Review Committee (ARC). The ARC had a voice at every administrative level of the Rosses' permit approval process, even though only two of its members or constituents were affected by the Rosses' proposed addition. The ARC was quoted with approval in the minutes of the Planning Commission and the City Council meetings, yet nowhere in VPO does it state that

the ARC has the right to be heard at all in a VPO administrative analysis.

Judge Gorenfeld responded to appellants' earlier argument concerning the impropriety of the ARC's involvement as follows:

> I do not agree with Petitioners argument that the V.P.O. constitutes an unconstitutional delegation of power by the City to the Homeowners Association or that the only power retained by the respondents is to "recommend mitigating measures and urge applicants to compromise with the homeowners association."
>
> *Inter alia,* the V.P.O. does empower the Planning Commission, when a complaint has been filed to a proposed development by a person aggrieved, to "Coordinate and conciliate to the maximum extent possible the resolution of disputes among property owners concerning view obstructions."
>
> That appears to be a reasonable and intelligent part of any dispute resolution system and is consistent with the expanding efforts to provide more efficient, prompter and less expensive methods than now exist. This includes the whole plan of commercial and judicial arbitration, mediation, neighborhood justice centers and related efforts. [App. B5-6]

Judge Gorenfeld's words demonstrate that the court is, effectively, condoning a situation where a homeowner proposing an addition can properly be challenged by everyone in town regardless of whether such persons' "views" are obstructed by the addition or not. In early days when such a delegation of power was permitted, the cry would be: "kangaroo court." Today, we have constitutional guarantees to protect against such vigilantism. The rights of a property owner shall not be abridged by laws

which place the fate of property use entirely in political hands unfettered by clear, meaningful guidelines.

It is true that the ARC's role is not given a formal, legal sanction as was done in the *Pacesetter Homes* case. Yet the ARC most surely had and used its powers to work a grave injustice. The City's blind acquiescence to this citizen's group's determinations and preferences gave the ARC its own vote on the Rosses' proposal, a vote which vetoed all support therefor. This violates the Rosses' federal due process rights and renders the VPO unconstitutional.

IN ENACTING AND APPLYING THE VPO TO APPELLANTS, THE CITY HAS SUBSTANTIALLY DECREASED THE USE TO BE MADE AND THE VALUE OF APPELLANTS' PROPERTY RESULTING IN AN UNCONSTITUTIONAL TAKING OF PROPERTY WITHOUT JUST COMPENSATION

The *First English* and *Nollan* decisions have resulted in a devastating blow to California's judicial decision to accord personal property rights virtually no recognition when such rights are pitted against administrative zoning or permit regulations. With the demise of *Agins, supra*, and its progeny, for the first time in many years a California homeowner may now seek compensation if he is deprived by regulatory structure of all use of his property. While *First English* did not specifically pass upon the question of whether the compensation required upon a total taking is equally required upon a partial taking, the *Nollan* case addresses these questions and comes out in favor of the homeowners, providing certain criteria are met.

In *Nollan*, this court ruled that if government requires a private property owner to dedicate a public beach easement to serve a public interest as a condition to obtaining

a permit to rebuild the owner's house, the state must pay for such an easement. *Id.* at 97 L.Ed.2d 677, 685. To hold otherwise is in violation of the Fourteenth Amendment.

> To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather, (as Justice Brennan contends) "a mere restriction on its use," post, at — , n 3, 97 L. Ed. 2d 696-697, is to use words in a manner that deprives them of all their ordinary meaning. Indeed, one of the principal uses of the eminent domain power is to assure that the government be able to require conveyance of just such interests, so long as it pays for them.

Id.

In the present case, the City has imposed a condition to the Rosses' obtaining a building permit, *i.e.*, that they dedicate a permanent, albeit vague, light and air easement to their two uphill neighbors. Prior to this Court's decision in *First English*, there could be no compensation sought by the homeowner for such "taking/dedication" absent a prior, successful challenge to the constitutionality of the ordinance. *Agins v. City of Tiburon, supra.* The present state of the law permits the "taking" argument to be raised and acted upon irrespective of any constitutional challenge. *First English*, 96 L.Ed.2d 267.

The Rosses are being required to forego the use of a substantial amount of their property due to the VPO. The VPO is in direct conflict with the City's Maximum Building Height ordinance, thus presenting the same conflict in the City's argument in justification of the VPO as was raised in *Nollan*, to wit:

> The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the

> justification for the prohibition. When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury.

Id. at 97 L.Ed.2d 689.

In this case, the City is using one restrictive ordinance against the Rosses (the VPO) even though such ordinance is in direct conflict (based upon the application to the Rosses herein) with another City ordinance. Absent the VPO, the Rosses could build an addition to their home as long as it did not exceed the City's 35 foot height restriction. With the enactment of the VPO, a homeowner must obtain his neighbor's approval of his building plans whenever it appears to the City that some neighbor's view will be obstructed by the addition. Thereafter, the City, the affected neighbor and other concerned groups are permitted to object to the addition based on any aesthetic ground they choose, *i.e.,* style, color or design. Yet the VPO says nothing about style, color or design; it only deals with *view* and *height* concerns. Under the *Nollan* analysis, the condition to the Rosses building their addition, *i.e.,* compliance with the VPO, fails to further the end advanced as the justification for the prohibition. An objection to style, color or design is not an objection to view impairment, but solely to aesthetics.

Nollan and *First English* mandate that serious consideration be given to the property rights that the City is taking from the appellants based upon the fact that the City has never offered or agreed to pay for the *de facto* light and air easement it is giving to the Rosses' two uphill neighbors. Upon such consideration, this Court should conclude that California has once again permitted government to take private property without paying for it.

Such a taking is in violation of the Fifth and Fourteenth Amendments.

California is perhaps fearful of what would happen if the courts were to give all residential property owners their full, due process rights before taking their property through regulation. This age-old floodgates argument was raised by Justices Stevens, Blackmun and O'Connor in their dissent in *First English,* 96 L.Ed.2d 268. The *First English* Court's majority was not swayed by it, however. *Id.* All that will or should happen as a result of *First English* and *Nollan* is that municipalities will strive to enact better and more equitable laws in the area of property regulation. All persons, whether property owners or not, will benefit by laws which require that due process rights are observed before property is taken through regulation.

Appellants have raised these issues almost before the ink was dry upon this Court's opinions in *Nollan* and *First English* and the California Supreme Court's total failure to permit a hearing thereon indicates its continued hostility to the property rights of its citizens. This Court should give appellants their day in Court to obtain a full and fair decision as to whether the City has taken their property without just compensation, or, in the alternative to remand this case to a lower state court for purposes of obtaining a hearing on these matters.

CONCLUSION

In the domain of regulating private property and exercising governmental "taking" rights, California steps to a different drummer than does this Court. California's interpretation of the mandate of the Fifth and Fourteenth Amendments in the area of property rights continues to permit property owners to be deprived of due process of law and to suffer takings without just compensation.

The recent decisions of this Court in *Nollan* and *First English* herald not a handcuffing of local government in its attempts to regulate property for the benefit of all, but simply enforces government's duty to do so while being mindful of the rights of individual property owners. In the present case, the conflict between government and property owners should be resolved in favor of appellants.

This Court should find the VPO to be unconstitutionally vague as written and applied and in violation of appellants' Fifth and Fourteenth Amendment rights because it delegates power uncontrolled by any standard or rule and results in a taking of private property without just compensation.

Respectfully submitted,

WEISMAN, BUTLER & WATSON
LAURIE J. BUTLER

By: _____

Laurie J. Butler,
Attorneys for Appellants
W. Kenneth Ross and
Carole A. Ross

APPENDIX A

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE CITY AND COUNTY OF LOS ANGELES

No.

W. KENNETH ROSS AND CAROLE A. ROSS,
Petitioners,

v.

THE CITY OF ROLLING HILLS ESTATES, An Incorporated City, THE PLANNING COMMISSION OF THE CITY OF ROLLING HILLS ESTATES, AND THE CITY COUNCIL OF THE CITY OF ROLLING HILLS ESTATES,
Respondents.

PETITION FOR WRIT OF MANDAMUS WITH POINTS AND AUTHORITIES

Original Filed February 11, 1986.

Petitioners W. Kenneth Ross and Carole A. Ross, petition this Court for a writ of mandamus under C.C.P. § 1094.5, directed to respondents, The City of Rolling Hills Estates, The Planning Commission of The City of Rolling Hills Estates, and The City Council of The City of Rolling Hills Estates and by this verified petition represent that:

1. At all times mentioned in this petition, petitioners have been and now are residents of The City of Rolling Hills Estates (hereinafter "City") and the owners of residential real property located at 4667 Rollando Drive, Rolling Hills Estates, California.

2. At all times mentioned in this petition, respondent The City of Rolling Hills Estates (hereinafter the

"City"), has been a City incorporated and existing under the laws of the State of California.

3. At all times mentioned in this petition, respondent The City Council of the City of Rolling Hills Estates (hereinafter the "City Council") has been and now is the municipal administrative agency charged with administering the provisions of the Rolling Hills Estates Municipal Code, (hereinafter "Mun.C."). Municipal Code sections 1950 through 1956, 1898 and all other such code sections cited herein and in the Points and Authorities are attached hereto, incorporated herein by this reference and marked, collectively, Exhibit "A." The presiding officer of the City Council is Mayor Jerome Belsky and it is composed of five members, including Mayor Belsky.

4. At all times mentioned in this petition, respondent the Planning Commission of the City of Rolling Hills Estates (hereinafter the "Planning Commission") has been and now is the municipal agency charged with approving residential building permit and variance applications when Mun.C. sections 1950 through 1956 are involved.

5. On or about June 6, 1985, petitioners submitted a proposal (hereinafter the "Ross Proposal") for an addition to their residence to the Planning Department Staff (hereinafter the "Staff") of the City. The Ross Proposal is numbered by the City as V-116-84. Thereafter, and prior to August 19, 1985, the Planning Department of the City issued a report stating that the Ross Proposal was found to meet all City zoning requirements. The report further stated, however, that the views of the Los Angeles Basin from two residences adjacent to the petitioners could be impacted to some degree. Accordingly, the Staff contacted the affected property owners, Mr. and Mrs. Stanley Crawford and Mrs. Margaret Larson relative to the view issue. On July 25, 1985, the City received letters

of objection from these affected property owners. No other residents of the City were found to have affected views.

As a result of receiving such letters, the Staff referred the Ross Proposal to the Planning Commission to make a determination on the potential view blockage issue. The Staff recommended, however, that the Planning Commission *approve* the Ross Proposal by minute action.

On August 19, 1985 the Planning Commission conducted a public meeting relative to the Ross Proposal at which testimony was taken from petitioner W. Kenneth Ross, affected property owner Stanley Crawford and also from three other non-affected City residents. The Planning Commission found that the proposed addition to petitioners' residence did not conform to the objectives of the View Protection Ordinance, Mun.C. §§ 1950-1956, and denied approval of the Ross Proposal.

On or about August 20, 1985 petitioners sent written notification to the City and the City Council that petitioners were appealing the August 19, 1985 decision of the Planning Commission. Thereafter, and subsequent to October 10, 1985, the Staff Director sent a report to the Mayor of the City and to the City Council relative to the Ross Proposal wherein he recommended certain mitigating measures relative to the View Protection Ordinance. Such recommendation was a total change of opinion, based on *no new evidence* and *no changed conditions.*

On October 10, 1985, the City Council held a public meeting relative to the Ross Proposal at which oral testimony and written and photographic evidence was received. At said meeting, petitioner W. Kenneth Ross requested that the City Council: (1) approve petitioners' building plans as submitted and previously recommended by the Staff and (2) permit petitioners to retain their

swimming pool and associated decking. Following the conclusion of the City Council meeting, the City Council voted to deny petitioners' request for approval of their proposed addition and the right to retain their pool and decking. A true and correct copy of the transcript of the October 10, 1985 City Council meeting prepared by the City is attached hereto, incorporated herein by this reference and marked Exhibit "B." Also attached hereto and incorporated herein by this reference as Exhibit "C" is a photograph of the graphic depiction of the proposed addition to which the City Council referred throughout the October 10, 1985 Council meeting. A true and correct copy of the City Council's summary of the October 10, 1985 hearing is attached hereto and incorporated herein by this reference as Exhibit "D."

6. Respondents' decision as set forth in Exhibits "B," "C," and "D" is invalid under C.C.P. § 1094.5 for the reason that respondents committed a prejudicial abuse of discretion.

A. Such prejudicial abuse of discretion occurred in that respondents failed to proceed in the manner required by law as follows:

(1) Testimony by and evidence related to complaints of unaffected City residents and property owners was received by the Planning Commission and the City Council when consideration of a View Protection Ordinance challenge is limited to receiving evidence from "persons aggrieved" or in other words, persons whose views are significantly obstructed. Mun.C. § § 1950-1955;

(2) Respondents considered testimonial and written evidence of non-view related aesthetic concerns such as architectural design, size and bulk of the proposed addition in direct contravention to the plain meaning of

the statute and the Staff's earlier advice relative thereto;

(3) Respondents considered the applicability, enforceability and interpretation of the Marloma Homeowners Association Conditions, Covenants and Restrictions (hereinafter "CC&R's") which have no applicability to approval by respondents of petitioners' building permit and variance request. (At present, the Marloma Homeowners Association apparently administers the CC&R's for Marloma, the residential area of the City in which petitioners reside); and

(4) Respondents based their decision on the interpretation of an ordinance, Mun.C. § § 1950-1956 (hereinafter the "View Protection Ordinance") which is unconstitutionally vague and overbroad.

B. Respondents' decision is not supported by the findings in that:

(1) Respondents found that based on primarily non-view related aesthetic considerations, the View Protection Ordinance was not being complied with; and

(2) They found that a variance to permit petitioners to retain their swimming pool and decking was not justified even though two council members specifically stated that they had no objections to petitioners' keeping their pool and even though the City considers the pool and decking to be a community asset and so advised petitioners.

C. Respondents' findings are not supported by the evidence in that:

(1) The division of City government charged with determining in the first instance if there is a significant view obstruction (the Staff) consistently found no such significant view obstruction created by the Ross Propo-

sal until they bowed to the pressure of the Planning Commission, the City Council, and non-affected City residents and had an impermissible change of mind. Such improper change of opinion and recommendation, which resulted in their siding with the Planning Commission, came after *no new evidence was produced* to show view impairment and after *no conditions had changed*. Further, their change of mind occurred very shortly after the earlier Staff recommendation that the Ross Proposal be approved by minute action.

(2) Photographic evidence of the amount of view impairment shows view loss to the most greatly affected property owner (the Crawfords) to be approximately 8%, which, actually and under case law, is not a significant obstruction;

(3) Evidence produced by opponents of the Ross Proposal and petitioners' pool variance request did not deal with view loss or prejudice to the City by granting a variance for the retention of the petitioners' pool, but, instead, dealt solely with: (a) aesthetic considerations related to the proposed addition and (b) the various City residents' displeasure with petitioners for, *inter alia*, not personally attending homeowner meetings even though they sent their representatives thereto and even though they provided the homeowners association with a set of plans for each proposed addition they submitted to the City.

7. Petitioners have exhausted the available administrative remedies required to be pursued by them in that they have appealed the Planning Commission's denial of their proposal to the City Council pursuant to Mun.C. § 316. There is no higher body to which an appeal of the denial of this permit and variance request may be made.

8. Petitioners do not have a plain, speedy and adequate remedy in the ordinary course of law.

WHEREFORE, petitioners pray that:

1. An alternative writ of mandamus be issued, ex parte; and

2. A peremptory writ of mandamus be issued ordering respondents to set aside their decision and approve both the Ross Proposal (V-116-84) and request for a variance from the City lot coverage requirements to allow them to retain their swimming pool and decking;

3. Petitioners recover their costs in this action; and

4. Other relief be granted that the Court considers proper.

/s/ W. KENNETH ROSS

W. Kenneth Ross, Petitioner

VERIFICATION

I, W. Kenneth Ross, say:

I am one of the petitioners in this action. The foregoing Petition For Writ of Mandamus with Points and Authorities is true, of my own knowledge.

Executed on February 6, 1986, at Rolling Hills Estates, California.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ W. KENNETH ROSS

W. Kenneth Ross

VERIFICATION

I, Carol A. Ross, say:

I am one of the petitioners in this action. The foregoing Petition For Writ of Mandamus with Points and Authorities is true, of my own knowledge.

Executed on February 6, 1986, at Rolling Hills, California.

I declare under penalty of perjury that the foregoing is true and oerreet.

/s/ CAROLE A. ROSS

Carole A. Ross

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

I.

INTRODUCTION

Petitioners seek an order requiring respondents to approve a proposed addition to the back of their house which has been found by the City to meet all building code and zoning requirements, but which allegedly violates the City's view protection ordinance. Petitioners further request an order requiring respondents, in connection with the approval of the proposed addition, to grant them a variance from the City lot coverage requirements to enable them to retain their swimming pool and related decking. Without such a variance, petitioners would be required to remove their pool to build their addition, as the proposed addition and the pool would exceed the City's lot coverage requirements.

The Court should grant the relief petitioners request by finding that there was prejudicial abuse of discretion when respondents denied such requests. Respondents based their decision on evidence having nothing to do with view preservation and found, by implication, that there was significant view obstruction when *all* the evidence was directly contrary to such a finding. Their denial of approval of the proposed addition was based solely on aesthetic considerations of the proposed addition and went against the Staff's earlier express recommendation for approval. Respondents further abused their discretion because they relied on an unconstitutionally vague and overbroad ordinance (Mun. C. § §1950-1956, the "view protection ordinance" or "VPO"), as exemplified by their

total failure to understand the ordinance as well as their duties in interpreting and enforcing this statute.

The variance denial was unjustified by virtue of the fact that no member of the City Council or other representative of any respondent herein stated or found that retention of the pool would be harmful to the City or made any other finding indicating that a variance pursuant to Mun.C. §1898 relative to the pool and decking was not authorized under the circumstances and necessary to abate a severe hardship to petitioners and their family. Further, petitioners had been advised several times by the City's Planning Director and others in the Planning Department that the City typically approves a lot variance request for a swimming pool because a pool is considered to be an asset to the community. No other resident of the City was ever required to remove a swimming pool to comply with lot coverage requirements. Details follow.

II.

ADMINISTRATIVE MANDAMUS IS THE PROPER REMEDY

Code of Civil Procedure, section 1094.5 is the governing statute under which petitioners must proceed to obtain relief from respondents' decision. Section 1094.5 provides in pertinent part:

> (a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer, the case shall be heard by the court sitting without a jury. All or

> part of the record of the proceedings before the inferior tribunal, corporation, board or officer may be filed with the petition, may be filed with respondent's points and authorities or may be ordered to be filed by the court. Except when otherwise prescribed by statute, the cost of preparing the record shall be borne by the petitioner .... If the expense of preparing all or any part of the record has been borne by the prevailing party, such expense shall be taxable as costs.
>
> (b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

The applicability of this statutory procedure to an action challenging a municipality's denial of a building permit and variance request is clear. See, *Allen v. Humboldt County Board of Supervisors*, 220 Cal.App.2d 877, 882 (1963). A constitutional challenge to the validity of the ordinance in question, here the View Protection Ordinance or "VPO", is further subject to C.C.P. §1094.5. *PMI Mortgage Ins. Co. v. City of Pacific Grove*, 128 Cal.App.3d 724, 732 (1981).

III.

THE COURT MAY ISSUE AN ALTERNATIVE WRIT EX PARTE

Code of Civil Procedure, sections 1087 and 1088 provide for the issuance of an alternative writ of mandamus and provide as follows:

> C.C.P. § 1087 The writ may be either alternative or peremptory. The alternative writ must command the party to whom it is directed immediately after the receipt of the writ, or at some other specified time, to do the act required to be performed, or to show cause before the court at a time and place then or thereafter specified by court order why he has not done so. The peremptory writ must be in a similar form, except that the words requiring the party to show cause why he has not done as commanded must be omitted.
>
> C.C.P. § 1088 When the application to the court is made without notice to the adverse party, and the writ is allowed, the alternative must be first issued; but if the application is upon due notice and the writ is allowed, the peremptory may be issued in the first instance. With the alternative writ and also with any notice of an intention to apply for the writ, there must be served on each person against whom the writ is sought a copy of the petition. The notice of the application, when given, must be at least ten days. The writ cannot be granted by default. The case must be heard by the court, whether the adverse party appears or not.

Based on the Petition and the supporting Memorandum of Points and Authorities, an alternative writ should issue herein. *Dare v. Board of Medical Examiners*, 21 Cal.2d 790, 796 (1943).

IV.

RESPONDENTS PREJUDICIALLY ABUSED THEIR DISCRETION IN DENYING PETITIONERS' REQUEST FOR A BUILDING PERMIT AND VARIANCE TO RETAIN THEIR SWIMMING POOL AND DECKING

Respondents' decision was a prejudicial abuse of discretion. It was based upon evidence which never should have been considered, upon findings wholly contrary to the evidence, upon an unconstitutionally vague statute and upon a failure to properly analyze all factors set forth in Mun.C. § 1898 relative to when a variance should be granted. Respondents ignored a clear and detailed, written expert analysis prepared by City employed professionals declaring that the proposed addition should be approved and further singled petitioners out for a pool variance denial when such variances are regularly approved by the City. This Court is respectfully requested to grant the alternative and peremptory writs as prayed.

A. *Respondents Failed To Proceed In The Manner Required by Law*

Abuse of discretion is present in this case because respondents did not proceed as they were required under the applicable law. Further, one of the statutes involved, the VPO, is so vague and overbroad as to make interpretation and enforcement thereof impossible.

1. *The Majority of the Evidence Offered and Given in Opposition to Petitioners' Requests Should Not Have Been Received*

To understand why irrelevant and prejudicial evidence received by respondents so greatly prejudiced petitioners, a chronology of the eleven-month process during which petitioners attempted to obtain approval for their addition must be set forth. In the review of the four different

sets of plans petitioners presented to respondents, respondents' responses thereto and the resulting, countless sleepless nights and extreme frustration experienced by petitioners, the enormity of respondents' abuse of discretion becomes clear.

On or about November 30, 1984, petitioners submitted their first set of plans for a proposed addition to their house to both the Planning Commission and to Palos Verdes Properties ("PVP") the organization previously charged with administering the CC&R's applicable to petitioners and the other Marloma residents. PVP approved the plans, but could not address certain set back and lot coverage variances. *At no time was the VPO raised.* (See, letter of petitioners to City Council dated October 10, 1985, which is attached hereto and incorporated herein by this reference as Exhibit "A." In this letter petitioners recount the history of their attempts to gain City permission to expand their home.)

Petitioners' lot, purchased prior to the City's incorporation, is a substandard size of 14,831 square feet. The minimum permissible lot size pursuant to City law today is 20,000 square feet. Mun.C. § 1823(a). Maximum lot coverage permissible is thirty (30%) percent. Mun.C. § 1823(e). A swimming pool is defined in the Municipal Code as a "structure" for purposes of measuring lot coverage. Mun. C. § 1804(b). The minimum lot size and coverage requirments all came into effect after petitioners' lot had been legally split. (See Exhibit "A" to the Petition for the text of all the above-cited statutes.)

Thereafter, petitioners submitted a second set of plans to the City's Planning Department Director who requested that certain changes be made. Petitioners did not submit these plans to the Planning Commission, but opted to invest more money and make the City's requested changes.

A third set of plans was submitted to the Planning Director in or about April, 1985. The Staff advised petitioners that this proposed addition would result in excess lot coverage for which variances had not previously been granted. Petitioners desperately wanted the addition to provide more living space for their family so they, reluctantly, agreed to remove their pool and decking.[1] Prior to sending the proposed addition plans to the Planning Commission for approval at its May 6, 1985 meeting, the Staff issued a report dated May 1, 1985 recommending approval of this proposal. A true and correct copy of said report is attached hereto and incorporated herein by this reference as Exhibit "B."

On May 6, 1985, the Planning Commission conducted a public hearing relative to petitioners' request for approval of their third set of plans. At that hearing, various City residents spoke against the plans and urged denial of the proposed addition. *The VPO was not raised.* See, Minutes of Planning Commission dated May 6, 1985, a true and correct copy of which is attached hereto as Exhibit "C" and incorporated herein by this reference.

At that hearing, the Chairman of the Planning Commission stated that he could not recall anyone coming before the Commission and being willing to remove a pool for additional living space. Both the Chairman and another commissioner expressed concern that the homeowners association should have more influence and the Commission should be concerned with compliance with the CC&R's. The Commission voted to deny approval of the variance request, even though the Staff had pointed out that this was a substandard size lot and, that under

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[1]Petitioners are aware of no other instance when a City homeowner was required by the City to remove a pool to obtain a permit to add on to his house.

similar circumstances, the Commission has allowed greater lot coverage. [Exhibit "C", p. 1, 2d paragraph].

On June 6, 1985, petitioners submitted their fourth set of plans to the Staff, which plans are the subject of this Petition. A true and correct copy of the blueprints for this proposed addition are attached hereto, incorporated herein by this reference and marked Exhibit "D." At this time and as they had done in the past, petitioners gave copies of these plans to the Architectural Review Committee (hereinafter the "ARC") of the Marloma Homeowners Association.* Pursuant to the CC&R's, a true and correct copy of which is attached hereto and incorporated herein by this reference as Exhibit "F," the ARC had 30 days to voice objections to petitioners' plans. About 5 days after the deadline, the Chairman of the ARC advised petitioners of ARC objections. [See Exhibit "A" hereto, p. 3 second full paragraph.]

Prior to receiving the ARC response, petitioner Ross, with the Crawfords' permission, took pictures of the Crawford city light and coast line view which would be affected by the Ross addition in order to address the Planning Director's view protection concerns. The Planning Department has all the originals of these photographs. True and correct copies of three (3) of said photographs by Ross of such view are attached hereto and incorporated herein by this reference as Exhibits "G,"

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*Petitioners had earlier voted against granting the homeowners association the power to enforce the CC&R's, believing the City's ordinances could more than adequately protect all City property owners' interests. This vote by petitioners made them unpopular with many of the other homeowners. Petitioners' reasons for their votes are set forth in a letter they sent to all of their neighbors on or about November 12, 1984. A true and correct copy of said letter is attached hereto, incorporated herein by this reference and marked Exhibit "E."

"H," and "I." These photos show that, at most, only about eight percent (8%) of the Crawfords' view would be affected. The markings on Exhibit "G" were made by the Planning Department and represent respondents' determination of where the alleged view blockage is located and the extent thereof.

It is significant to note that in all of petitioners' previous sets of plans there was an 8 foot wall proposed over the garage which the Crawfords agreed to and to which no one had ever objected. The present proposal calls for a height increase of six (6) feet over the prior submissions. Exhibits "H" and "I" depict a man standing on the roof of petitioners' garage. The height of the proposed addition would be about six feet higher than the top of the T-bar the man in the pictures is holding. This height is still approximately four (4) feet lower than the roof line of petitioners' house. Such additional height obstructs no more City lights than the earlier proposed additions because the additional six feet only obstructs sky. And, the additional height still meets all building code and zoning requirements.

There was never any objection to the eight (8) foot wall, yet, *that wall would obliterate the same City lights view as the proposed addition is claimed to obstruct.* Further, petitioners could easily plant trees which would obstruct far more sky view than the proposed addition and such trees would violate no ordinance. No member of any respondent clearly focuses on these facts at any proceeding herein.

After reviewing the fourth set of plans, the Staff issued a report to the Planning Commission wherein it recommended that the Planning Commission approve the Ross Proposal by minute action. Pertinent sections of that report read as follows:

CONCLUSION

Although it is Staff's opinion that modifications of this proposal are not required (in light of Staff's determination), it appears questionable whether any attempt to open views over the existing garage can be accomplished without severely restricting the use of the second story.

An important point to consider in the review of this proposal is that while the original submittal by Mr. Ross involved a Variance request for setback and lot coverage requirements, this current proposal only involves view preservation consideration. Therefore, all discussion regarding this proposal should address any potential impact on existing views of the Los Angeles Basin or other prominent scenic areas. Unlike the Variance hearings, such issues involving impacts on streetscape and neighborhood aesthetics are no longer points of consideration. Any discussion on the design of the addition should be related to view preservation. *It should be noted that if view preservation was not an issue then Mr. Ross' plan could have been approved without any formal notification to the neighborhood.*

In the letters of objection received by the City, the issue of a potential violation of the neighborhood's CC&R's is mentioned. It is important to emphasize that the City has no authority over such documents. If there are restrictions above and beyond the City's development standards, it is the Homeowner Association's responsibility to enforce such requirements. The City cannot restrict a property owner from implementing a proposal that meets with all City zoning and development requirements. Compliance with any CC&R requirements is an independent issue. Therefore, if Mr. Ross meets the

requirements of the view preservation ordinance, his rights as a property owner must be honored by the City.

While the City is well aware of the concerns expressed not only by the Crawfords and Larsons, but the neighborhood as well, this proposal meets with all development requirements, in the opinion of Staff. While Staff stressed the fact that consideration of this proposal only involves those properties whose views are impacted, it is unfortunate that a compromise could not be reached between Mr. Ross and these neighbors who had input on this proposal.

RECOMMENDATION

Staff recommends that the Commission consider the testimony of the applicant and those property owners whose views are impacted. *Staff further recommends the Commission approve the current proposal by minute action.* (Emphasis added.)

A true and correct copy of the Staff Report of August, 1985 is attached hereto, incorporated herein by this reference and marked Exhibit "J."

As set forth in Exhibit "J," the Staff concluded that *the amount of view impairment does not pose a significant impact.* [Exhibit "J," page 1, 3d paragraph]. However, because there was a finding of some view impact, the Staff was required to and did notify the two affected property owners of their findings and invited them to respond to the City's determination that the Ross Proposal should be approved.

On July 25, 1985, the City received letters of objection from the Crawfords' attorney and from Mrs. Larson. Because of their objections, it became necessary for the Planning Commission to make a determination on the

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potential view blockage issue. Absent such objections, because the Ross Proposal met all City requirements, it would have been approved by the Staff without any reference to the Planning Commission. [See Exhibit "J," page 1, 4th paragraph] True and correct copies of the Crawfords' attorney's letter and Mrs. Larson's letter to the City are attached hereto, incorporated herein by this reference and marked Exhibits "K" and "L," respectively.

Other correspondence relative to the view issue was forwarded to the City by the president of the homeowners association. Such correspondence included a petition signed by allegedly 80% of the Marloma residents. That petition is replete with inaccuracies and totally misrepresents the Ross Proposal. It provides:

MARLOMA AREA HOMEOWNERS

WE, the undersigned, are opposed to the application of Mr. and Mrs. Ken Ross for approval of a second-story addition to their home at 4667 Rollando Drive, Rolling Hills Estates, California. The opposition to this proposal is based on the following factors.

(1) The proposed second-story addition is equivalent to a three-story height and would be out of character with the existing Rollando and Marina Street scape . . . which is essentially rural single-story or split level homes.

(2) There is no precedent for the approval of this addition, rather an approval of the addition might set a precedent which could result in additional second-story additions on other lots, the effect of which would be to alter the character of the neighborhood.

(3) The proposed addition, where the height is so great, would infringe on the views of at least four neighboring homes.

(4) An approval of the proposed addition would violate the CC&R's, a legal contract for the Marloma District.

Following the above were signature lines. A true and correct copy of the letter from the president of the homeowners' association enclosing said petition is attached hereto as Exhibit "M" and incorporated herein by this reference. A true and correct copy of the Petition is attached hereto, incorporated herein by this reference and marked Exhibit "N."

On August 19, 1985, the Planning Commission held its public hearing on the Ross Proposal. At this hearing, after taking testimony from three unaffected residents and Mr. Crawford, the Commission denied approval of the addition. There was no substantive discussion of view obstruction and no specific finding of "significant view obstruction" was made. The major objection appears to be that petitioners would not compromise (*even though this was their fourth set of plans*). Since petitioners chose to stay with their final proposal, (which the Staff had approved in all respects) the Commission refused to approve the addition. A true and correct copy of the minutes from the Planning Commission's August 19, 1985 meeting is attached hereto, incorporated herein by this reference and marked Exhibit "O."

Following the Planning Commission's denial of the Ross Proposal, petitioners appealed this decision to the City Council. Copies of their letters making the appeal are attached hereto, incorporated herein by this reference and collectively marked Exhibit "P." On October 10, 1985 a hearing was held before the City Council whereat

petitioners requested approval of their Proposal and also sought approval of a variance to permit excess lot coverage to enable them to keep their swimming pool and decking.

On prior occasions, the Planning Director and Staff members had advised petitioners that the City typically approves a lot coverage variance request when a swimming pool is involved because a pool is considered to be an asset to the community. Indeed, many of petitioners' neighbors utilize the pool including Los Angeles Superior Court Judge Frank Baffa and his family. Further, and as set forth in greater detail, *infra,* adjacent cities exclude pools from square footage calculations to determine if there is excess lot coverage.

Prior to such meeting, the Planning Director submitted a Memorandum to the Mayor and City Council relative to the Ross Proposal. A true and correct copy of said Memorandum is attached hereto, incorporated herein by this reference and marked Exhibit "Q." In that memorandum, the Planning Director presents an incomplete summary of the background of this proposed addition. *He totally omits from his memorandum the fact that the Staff had originally recommended that the Planning Commission approve this Proposal by minute action, had originallly found the proposal to meet all City zoning and development standards, and had originally determined that the amount of view impairment does not pose a significant impact.*

On October 10, 1985, the City Council considered the Ross Proposal and the variance request. Both matters were properly before it. The Ross Proposal was appealed pursuant to Mun. C. § 316(a) and the variance request was properly considered by the City Council pursuant to Mun. C. § 1898. The City Council voted to uphold the action of the Planning Commission and deny the Ross Proposal and petitioners' variance request.

Such action occurred because the respondents did not proceed in the manner required by law. This constitutes prejudicial abuse of discretion as follows:

1. Respondents permitted consideration of and commented with approval upon complaints by unaffected residents as to aesthetic objections to the proposed addition. These types of objections were and are irrelevant and never should have been permitted. Further, as is clearly evident from the fourth set of plans, Exhibit "D" hereto, the proposed addition retains the same exterior covering, style and finish of the main house and is consistent with the design of the main house. Thus, even if one were to consider such aesthetic objections, which the VPO does not permit, it is immediately apparent that the objections are improper both substantively and procedurally.

The Staff had previously advised the Commission that it had no right to and would be proceeding improperly if it considered anything relative to the Ross Proposal other than whether the Ross addition significantly obstructed views of affected residents. The City Council was likewise cautioned to consider solely "view" matters. The VPO nowhere gives the City Council or Planning Commission the power to deny a building addition proposal because aesthetic preferences are not met. The only issue which can be passed upon is view obstruction.

In *DeMaria v. Enfield Planning and Zoning Commission*, 271 A.2d 105 (Supreme Ct. Conn. 1970), the Connecticut Supreme Court reviewed the denial of a special permit to erect apartment houses and reversed such denial because the zoning commission considered and based its decision on factors not pertinent to the considerations which such commission was required to apply under the zoning regulations. In that case, a copy of which is attached as

Exhibit "R" hereto, the only reasons which the zoning commission gave for denying the application were:

> "[t]he esthetic effect of the complex in relation to the existing neighborhood and the town in general," and that the proposed complex of apartments "does not present a satisfactory image of what the Commission believes apartments should convey to the Town." *Id.* at 108.

The Court notes with approval that in certain situations "sufficiently defined aesthetic standards may properly influence the decision of a zoning commission." *Id.* It goes on to state, however, that "vague and undefined aesthetic considerations alone are insufficient to support the invocation of the police power, which is the source of all zoning authority." *Id.*

In our case, the ordinance under consideration is clearly labeled "View Protection." The only thing involved in the enforcement of this ordinance is view. To construe the VPO as giving respondents the right to say view protection is the same as aesthetic design protection would be to run afoul of the rule of construction, *ejusdem generis.* See, *White v. Dorfman*, 116 Cal.App.3d 892, 897-898 (1981). In that case, the Second District Court of Appeal affirmed a Los Angeles Superior Court decision denying an injunction to stop construction of a house which appellants maintained blocked their view. The properties involved were located in the area known as Trousdale Estates, part of Beverly Hills, California. The denial of the injunction was based on an interpretation of applicable CC&R's. In one section of the CC&R's, buildings were permited to be constructed up to 22 feet in height, while in another section, vegetation and walls were limited to such height as would not unreasonably obstruct the views from any other lot.

In applying the rule of *ejusdem generis*, the Court stated that when general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. *Id.* at 897.

In our case one particular thing, *and one thing only*, forms the subject matter of the VPO — *view*. Therefore, all other descriptive language in the VPO can only pertain to view and not to design, shape or size. It has been noted that of all the aesthetic considerations, view impairment is probably the easiest to determine. See, e.g. "Note-Beyond the Eye of the Beholder: Aesthetics and Objectivity," 71 Mich. L. Rev. 1438, 1452 (1973), wherein the author states:

> "Maximum height limitations preserve the skyline of a city, as well as provide light and air for the inhabitants. Since these requirements are normally set out in terms of specific measurements, their application should present no subjective difficulties."

The Planning Commission and the City Council permitted evidence of matters other than view impairment to influence their decisions. They entertained and, apparently, agreed with testimony regarding claims that the Ross Proposal and variance request would result in a unique design, aesthetically displeasing to unaffected view site residents while they drove to work. While such findings are substantively wrong, to permit this type of evidence and testimony was to proceed in a manner not authorized by the law.

Exemplifying this abuse of discretion, Councilman Schwarzman was concerned with aesthetics and specifically that the size of the addition would overwhelm the

property. [Exhibit "B" to Petition, page 14] Councilwoman Mirels stated that she wanted to maintain the character of the existing neighborhood and felt petitioners should redesign their plans to arrive at a smaller addition. She was concerned with "getting a hodgepodge." *Id.* The Mayor felt the addition doesn't maintain the rural atmosphere and feels that in the future some provisions should be added to residential zoning requirements requiring aesthetic conformity with existing structures. *Id.* at 14-15.

The Council members' comments demonstrate that they considered evidence of, and in large part based their decision upon, matters having *nothing to do with an objective analysis of whether the Ross Proposal significantly obstructed affected property owners' views.* There is nowhere in Exhibit "B" to the Petition a statement by any City Council member that the Ross Proposal significantly obstructs the view of the Crawfords or Mrs. Larson. Respondents did not proceed in the manner required by law.

Another procedural defect clearly present at the October 10, 1985 City Council meeting is the fact that the City Council permitted the ARC Chairman to discuss the applicablity of the CC&R's. At pages 7 and 8 of the City Council meeting transcript, Ken Lattin discusses the CC&R's and states that they do not permit two-story structures. Further, the Mayor questions Lattin at length on page 9 thereof about such CC&R's. This discussion should not have been permitted as it has no bearing on view obstruction. For these reasons, as well, the respondents proceeded other than as the law requires.

2. *The VPO is Unconstitutionally Vague and Overbroad and Should Be Adjudged Void for Uncertainty.*

In connection with the interpretation and enforcement of the VPO, one is immediately struck by the dilemma of whether the VPO attempts to govern solely view or whether it is also attempting to govern all aesthetic considerations pertaining to a proposed structure or addition. Based upon the response to this ordinance by all who were charged with its enforcement, *except the Staff*, the universally stated reaction to it was that it permitted and authorized the consideration of non-view related aesthetic concerns. Since view is all that can be regulated based upon the plain meaning of the VPO, and since other concerns are referenced therein and guide enforcement based on non-view related critieria, the VPO should be adjudged unconstitutionally vague, uncertain and overbroad. Further, the VPO is unconstitutionally uncertain as it provides no guidelines for adequate enforcement. See, *Pacesetter Homes, Inc. v. Village of Olympia Fields*, 244 N. E. 2d 369 (Ct. App. Ill. 1968) and *City of West Palm Beach v. Duffey*, 30 So. 2d 491 (Supreme Ct. Fla. 1947), both of which cases are attached hereto, incorporated herein by this reference and marked Exhibits "S" and "T," respectively.

In *Pacesetter,* a village ordinance which created an architectural advisory committee and granted declaratory powers thereto with respect to issuance of building permits was held to be unconstitutional for failure to set forth adequate standards or guidelines to govern the action of the committee in determining whether proposed construction or alteration would be violative of the provisions of the ordinance.

It is important to compare the VPO with Ordinance 63 in *Pacesetter.* In that action, an applicant for a building permit sought a writ of mandamus to compel a village to

issue a building permit and to have Village Ordinance Number 63 declared unconstitutional and void.

The preamble to Ordinance 63 recites that the purpose of the Ordinance is to provide for and protect the health, safety, comfort and convenience of the village residents. The preamble asserts the desirability of the enactment of reasonable standards for home construction and subdivision design, and recites that "excessive similarity, dissimilarity or inappropriateness in exterior design and appearance of property" adversely affects the desirability, stability, economic and taxable value, and the like, of nearby property.

The Ordinance provides in pertinent part that plans for new building construction, or the remodeling or alteration of existing buildings within the Village are to be submitted to the Village Building Commissioner for the issuance of a building permit. If the Commissioner "believes" that the proposed construction or alteration "may" produce excessive similarity, dissimilarity or inappropriateness in relation to nearby property, he shall refer the application to the Architectural Advisory Committee for further consideration. If "any members" of the Committee likewise "believe" that the proposed construction or alteration "may" produce the same result, he shall direct the Building Commissioner to refer the application to the Architectural Advisory Committee as a body. The Committee must then consider the application, on the same basis as did the Building Commissioner, and "no building permit shall be issued" unless a majority of the Committee determines that the proposed construction or alteration will not produce the "harmful effects" as therein provided. *Id.* at 370.

The standards in *Pacesetter* to be employed to determine if an application violates Ordinance Number 63 are relatively specific. Nevertheless, the Court struck down the ordinance as conferring too broad a discretion on the Committee and failing to prescribe adequate standards to control the Committee in making its approval or disapproval determination. *Id.* at 372.

In our case, we have the very same situation. Effectively, the City, by acceding to the ARC's requests, is permitting the VPO to be enforced by the ARC and is requiring the ARC to follow no guidelines at all in its interpretation and enforcement of the VPO. Because the guidelines or standards to be employed to determine view impairment are hopelessly vague, the discretion in respondents and, apparently, the ARC is far too broad. The actions of and the comments of the Planning Commission and the City Council members, demonstrate that they do not understand what the VPO permits them to do. Nowhere in the VPO is there a requirement that the City body charged with enforcing the VPO make a specific finding of significant view impairment, such as to justify denial of an application for a building permit or variance request. *And, no such finding was ever made!*

The sole action which the Planning Commission and the City Council appear to be empowered to take under the VPO is to recommend mitigating measures and urge applicants to compromise with the homeowners association. Such a result effectively creates a situation where if the neighbors dislike or disapprove of you or your plans for whatever reason, they can hold up any proposed building and your only remedy is to go to Court. This is unfair.

Respondents consistently defer to and blindly follow the homeowners association's recommendations. It is almost as if no permit may be issued by the City absent

homeowner approval. The City has improperly delegated its administrative and legislative powers to the homeowners. Such discretion placed in a body wholly unrelated to the City is improper and further points up the vagueness and overbreadth of the VPO. This Court should find that the VPO is void for vagueness, overbreadth and uncertainty.

B. *Respondents' Decision Is Not Supported By The Findings*

Nowhere in the transcripts of the City Council hearing or in any minutes of the Planning Commission meetings is there a finding that the Ross Proposal significantly obstructs the views of the Crawfords or Mrs. Larson. Nowhere in the City Council hearing transcript is there a finding that there do not exist practical difficulties, unnecessary hardships or results inconsistent with the general intent and purpose of Mun. C. § 1898 such as to justify refusal of petitioners' lot coverage variance request to retain their pool and decking.

What was found by the Council and the Planning Commission was that: (1) to preserve some undefined "rural quality" of the neighborhood, the Ross Proposal could not be approved and (2) the swimming pool and decking did not constitute a problem and nothing would be gained by making petitioners remove them. As Councilwoman Mirels stated: "Nobody sees that — Why shouldn't he have the use of it." [Exhibit "B" to Petition, page 14, second paragraph]

Further, Councilman Schwarzman stated at page 14, "we don't particularly like the idea of a structure on a piece of property that is so large as to overwhelm that property and so whether someone takes a swimming pool out of the backyard to do something else, well, it's not

exactly the intent." [Exhibit "B" to Petition, page 14, paragraph 1].

The findings were not that there was significant view obstruction or that it would be inappropriate to grant the requested variance, but only that the Ross Proposal was not in conformity with the preferences of 80% of petitioners' neighbors, all but two of whom had no right to oppose the addition. Such findings are not surprising in view of the fact that the City Council was up for reelection about three weeks after this hearing. With eighty (80%) percent of the people opposed to the Ross Proposal and upset with petitioners' refusal to approve the Marloma Homeowners Association as the entity with responsibility for enforcement of the CC&R's, it is appropriate to question the objectivity and neutrality of the City Council when it considered the Ross Proposal.

The findings of the City Council do not support the decision. At best, the findings wholeheartedly support the retention of petitioners' pool and decking. Respondents prejudicially abused their discretion.

C. *The Findings Are Not Supported By The Evidence*

This factor is, perhaps, the most important factor in our petition for a writ of mandamus. As has been previously discussed, the real reason for the decision appears to be that the Ross Proposal was found by respondents to be aesthetically displeasing to other homeowners. The Staff report to the Commission [Exhibit "J"] recommends denial yet does so based on no new evidence and no changed conditions from when the Staff recommended approval by minute action a few months prior. Such unreasonable "mind changing" is improper. *Rockshire Civic Assn., Inc. v. Mayor and Council of Rockville*, 358 A. 2d 570, 580 (Ct. Special App. Md. 1976). A copy of the *Rockshire* case is attached hereto and incorporated herein

by this reference as Exhibit "U." The earlier Staff Report, [Exhibit "J"] was based on detailed analysis and first-hand investigation of potential view impairment by experts skilled in such a task. That report wholeheartedly pushed for approval.

In *Seligman v. Tucker*, 6 Cal.App.3d 691 (1970), the court had to determine if a residential addition unreasonably obstructed another homeowner's view. In arriving at his decision, the trial judge viewed the site and concluded that the view of the complaining neighbor was obstructed forty (40%) percent. This decision is important because it provides precedent for measuring view loss through percentages and is authority for having the trial judge view the site. Further, if 40% is unreasonable, 8% (the view obstruction estimated in our case) cannot possibly equate to a significant view obstruction.

Looking further at the key question under the VPO of whether the Ross' addition is too high, even though it is seven feet lower than the maximum height permitted by the Municipal Code, there is ample factual data in the record to show that the Ross' landscaping already obstructs much of what will be built and that based on the Staff Report, the view loss is minimal. The City provided no data to refute the Staff findings and all the complaints respondents entertained from residents about view loss are inexact and highly emotional. Denying a property owner the right to derive the maximum benefit from his property based on such criteria should not be sanctioned. [See Transcript of October 10, 1985 Council Meeting, pp. 10-11].

In the course of attacking the Ross' addition, the true nature of the homeowners association's displeasure with petitioners and their proposed addition came out. Their objections went far deeper than view and their stated complaint was that petitioners should not be allowed to

build over the garage at all. Such generalized conclusions, protests and unsubstantiated opinions about what is or is not right for the neighborhood constituted the evidence supporting respondents' findings in this case. This was wholly improper. See, *Dempsey v. Boys' Club of City of St. Louis, Inc.*, 558 S.W. 2d 262 (Ct. App. Mo. 1977), a true and correct copy of which case is attached hereto, incorporated herein by this reference and marked Exhibit "V."

What this Court should look to and what many other Courts have examined in evaluating the propriety of grants under zoning laws dealing with aesthetic concerns is whether there are experts reviewing and analyzing the factors which lead to a conclusion of significant obstruction of view or a similar, related finding. See, *Reid v. Architectural Bd. of Review of City of Cleveland Heights*, 192 N.E. 2d 74 (Ct. App. Ohio 1963); *State v. Saveland Park Holding Corp.*, 69 N.W. 2d 217 (Supreme Ct. Wis. 1955); and *State Ex. Rel. Stoyanoff v. Berkeley*, 458 S.W. 2d 305 (Supreme Ct. Mo. 1970). True and correct copies of these three cases are attached hereto, incorporated herein by this reference and marked Exhibits "W," "X" and "Y," respectively.

In our case, the experts who reviewed the potential view impairment found no significant obstruction. Their later, unsupported and unjustified "flip-flop" must be disregarded. If the VPO is to have any meaning at all, the terms "significant view obstruction" must be capable of measurement. We would strenuously urge this Court to visit the site and, itself, examine the view of the Crawfords and Mrs. Larson to be able to determine first hand if the view obstruction is significant. Upon such observations, we feel confident that the Court will see no more view loss than the Staff did and related in Exhibit "J."

The visual element in demonstrating whether view impairment exists is so key that at the October 10, 1985 City Council meeting, petitioner W. Kenneth Ross submitted various photographs of other Marloma homes which were either two story or to which additions had been made. Such photos are attached hereto, incorporated herein by this reference and marked Exhibit "Z." Such photos clearly show that other residential additions in the Marloma area which are the same height above the existing roof line as the Ross Proposal have been allowed and that at least nine homes in the area have two stories. Any findings or claims to the contrary are unsupported and directly refuted by these photographs.

Petitioner has also attached seven blown up versions of the houses photographed in Exhibit "Z." These seven pictures are attached hereto and incorporated herein by this reference as Exhibits "AA" to "GG." Such photos establish several different styles of architecture, houses of great height, bulk and different design. To find that petitioners' proposed addition is unique and not in keeping with the Marloma rural setting, whatever that means, is contrary to this photographic evidence of what has been built and approved by the City in the Marloma Area.

Finally, the finding that no variance for the pool and decking should be approved is unjustified by the evidence and wholly contrary to the City's earlier representation on this issue and directly contrary to the treatment accorded pools and decking by immediately adjacent cities. At the October 10, 1985 hearing, petitioner Ross urged a need to keep the pool for the family's recreational needs. The petitioners have two small children who regularly use the pool in the spring and summer. The children also invite their friends to use the pool. Due to the topography and the isolated nature of this area, having

recreational opportunities right on the property is very important for a young family.

It is common knowledge that in California you need to learn how to swim to be safe since we live near the Pacific Ocean. As petitioners argued in Exhibit "A" hereto, why should they be permitted to play croquet but not swim?

Three cities immediately adjacent to Rolling Hills Estates which have ordinances dealing with lot coverage and/or the treatment of swimming pools for purposes of calculating what would exceed maximum lot coverage limitations are Palos Verdes Estates, Rancho Palos Verdes and Rolling Hills, California. Petitioners acknowledge that other cities' ordinances relative to lot coverage are not binding upon respondents. However, the treatment accorded swimming pools by these cities in instances where an excess lot coverage situation is involved demonstrates how much of an asset, as well as a necessity, a swimming pool is in California. A review of such ordinances reveals the following.

A. *Palos Verdes Estates*

Ordinance No. 84 of the City of Palos Verdes Estates provides in pertinent part:

SECTION 5.8 *Lot Coverage Permitted*

In no case shall more than thirty (30) percent of any lot or building site be covered by buildings.

SECTION 2.6 *Building*

A structure having a roof supported by columns or walls. (See "structure").

SECTION 2.35 *Structure*

Anything contructed or erected and the use of which requires more or less permanent location on the ground or

attachment to something having a permanent location on the ground, but not including walls and fences less than four and one-half (4-½) feet in height when located in side or rear yards, nor other improvements of a minor character.

The above sections indicate that the City of Palos Verdes Estates does not consider a swimming pool and related decking to be a building. Further, on August 24, 1983, the City Council notified all residents who might be applying for "Sports Courts" as follows:

The following items will be considered on an individual basis by both the Planning Commission and City Council as the application and plans are reviewed:

> 1. *Lot Coverage* — No more than 30% of the lot shall be permanent buildings. *No more than 75% of the lot should be covered by permanent structures, including buildings, swimming pool, spa, gazebo, sports court, lath house, patios, and pool decking.* (Emphasis added.)

A true and correct copy of all the above cited ordinances and the August 24, 1983 Notice are attached hereto and incorporated herein by this reference as Exhibit "HH."

B. *Rancho Palos Verdes*

Municipal Code, section 17.40.040 entitled "Open Space Area" provides:

> An open space area shall be provided on each lot with a residential structure and shall consist of the minimum area requirements established in the district development standards. Open space areas shall not include any structures, driveways, or parking areas. In multiple-family residential units, private outdoor decks and balconies with a minimum dimen-

sion of seven feet which are designated for the exclusive use of the occupants of an individual unit may comprise up to thirty percent of the open space area requirement. (Ord. 75-78 (part), 1975).

This ordinance is interpreted by the City of Rancho Palos Verdes to *exclude* swimming pools and decking from those items considered in calculating percentage of open space/lot coverage which is required to be 60%. True and correct copies of the relevant Rancho Palos Verdes Municipal Code Sections are attached hereto, incorporated herein by this reference and marked Exhibit "II".

C. *Rolling Hills*

The City of Rolling Hills is a gated community in which there are no lots with building pads less than 12,000 feet. The minimum lot size is 43,560 square feet and there is a twenty percent (20%) lot coverage limitation. While swimming pools are not excluded from the 20% coverage, due to the size of these lots, effectively, residents are permitted more than adequate space to build large homes and pools and decking. A true and correct copy of the relevant Rolling Hills Municipal Code sections are attached hereto, incorporated herein by this reference and marked Exhibit "JJ."

The above ordinances clearly demonstrate how pools and decking are viewed in this geographical area. They are assets to the community and important and necessary recreational structures which these cities favor retaining. They should be retained in this case for the same reasons.

If ever there were a situation where a variance to keep the pool should be granted, this is it. If ever there were a situation where a homeowner had done everything under the sun to comply with all applicable building laws and yet still be able to derive the maximum benefit from his property, this is it. If ever there were a situation where a

City failed to treat a resident fairly in light of the circumstances of an undersized lot, limited building options, specific living quarter space needs and full code compliance, this is surely it.

Respondents abused their discretion and this wrong should not continue to go unredressed. This Court should do justice and let petitioners build their addition as planned and keep their swimming pool and decking.

V.

CONCLUSION

Based on the foregoing, this Court should grant petitioners' request for an alternative writ and a peremptory writ and reverse respondents' denial of a building permit and variance request to keep their swimming pool and decking.

WEISMAN, BUTLER & WATSON

BY: /S/ LAURIE J. BUTLER

LAURIE J. BUTLER,
Attorneys for Petitioners

Dated: February 10, 1986

APPENDIX B

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

Date April 15, 1986

Honorable ABRAHAM GORENFELD, Judge Pro Tem
M. PARKER, Deputy Sheriff
S. NADOLNY, Deputy Clerk

SWC 83320

W. KENNETH ROSS and CAROLE ROSS

vs.

THE CITY OF ROLLING HILLS ESTATES,
etc., et al.

Counsel for Plaintiff
WEISMAN, BUTLER and WATSON

Counsel for Defendant
RICHARD R. TERZIAN

NATURE OF PROCEEDINGS: SUBMITTED MATTER

In the matter heretofore submitted on April 1, 1986, the Court now renders it's decision and order as follows: Petition for Writ of Mandate is denied.

Counsel for Respondent to give notice.

MEMORANDUM OPINION

INTRODUCTION

Contrary to Petitioners' contentions, Respondents did *not* base their decision on evidence having nothing to do with view preservation. *All* of the evidence was *not* directly contrary to a finding of view impairment. Denial of approval of the proposed addition was *not* based solely on aesthetic considerations. The View Preservation Ordi-

nance (V.P.O.) is not unconstitutionally vague. The issue of denial of a variance is not properly before the court at this time.

The Variance

At its meeting of May 20, 1985 the Planning Commission denied Petitioners' variance request. Petitioners did not prosecute an appeal but elected, instead, to redesign the plans so as to make a variance unnecessary. The new plans were found by the Planning Commission to violate the V.P.O., and Petitioners then filed a timely appeal to the City Council. This appeal concerned only the V.P.O. problem and not the variance.

The Appeal is evidenced by exhibit "P" to the Points and Authorities. It is dated August 20, 1985 and states in pertintent part:

> "I hereby appeal a minute action taken by the Planning Commission at their meeting on August 19, 1985, regarding a *view preservation issue* (emphasis added) in the proposed addition to my home"

At the same time, in a separate letter, the City was advised that Petitioners were then represented by their attorney, Mr. Mark Weisman. Presumably, petitioners had the benefit of Mr. Weisman's legal advice when they prepared their appeal.

Attached to the Petition as exhibit "D" are excerpts from the City Council Meeting which are entitled:

> "APPEAL OF PLANNING COMMISSION DETERMINATION OF NON-COMPLIANCE WITH *VIEW PROTECTION ORDINANCE* REGARDING A PROPOSED TWO STORY ADDITION"

A fair reading of these minutes indicates that all participants understood that what was under consideration was the question of view impairment. Was *all* of the discussion relevant to this issue? Probably not. But consider the nature of the ordinance. It requires that:

> "Development proposals should be coordinated in order to:
>
> (a) Maximize open space preservation.
>
> (b) Protect view corridors, natural vegetations, land forms and other features.
>
> (c) Minimize the appearance of visually intrusive structures.
>
> (d) Prevent the obstruction of property owners' *views* by requiring appropriate construction of new structures or *additions* to existing buildings or adjacent parcels.
>
> (e) Assess the potential view loss from public areas of any proposed major structures as well as alterations and additions to existing structures.
>
> (f) Determine whether other suitable design options are available to the property owner in order that view obstructions may be eliminated or lessened in severity"

Petitioners argue that Respondents should have restricted the discussion to the factors described in subparagraph (d), but there was no legal duty to do so. Nevertheless, most of the discussion was related to that subject.

Did some irrelevant discussion take place? Maybe, but what difference does it make if there is substantial evidence in the light of the whole record which supports

Respondents' findings. The City Council is not a court of law. Proceedings are conducted by laymen. No rules of evidence must be satisfied. And even in courts of law, admission of irrelevent evidence does not compel appellate reversal. Moreover, in this case there was a special reason for a full and open hearing. It should have had a therapeutic effect, in view of Petitioner's feelings that they were being discriminated against because of political considerations.

Exhaustion of Administrative Remedies

In order not to extend this discussion unduly, I adopt Respondents' argument as set forth in part IV of their Points and Authorities.

Moreover, Petitioners should be reminded that they may still accomplish the major part of their objective by complying with the recommendation set out in exhibit "Q" (Memorandum from Planning Director to the Mayor and City Council):

> "That the Council stipulate as mitigating measures that plans be revised to reduce the maximum height of the addition to 22'6" and that no second story be permited over the garage"

SUBSTANTIAL EVIDENCE SUPPORTS THE FINDINGS AND THE FINDINGS SUPPORT THE DECISION. THERE WAS NO PREJUDICIAL ABUSE OF DISCRETION.

* * *

I agree with the argument of Respondents in Points III, V and VI of their oppositions.

Petitioners argue that there is no finding "that the Ross Proposal significantly obstructs the views of the Crawfords or Mrs. Larson." But such a finding is unnec-

essary in light of the City Council's decision to uphold the Planning Commission's determination of non-compliance with the View Protection Ordinance. Although Councilman Muller inadvertently moved to uphold the denial of the *variance*, the entire discussion as set forth in the transcript of the October 10, 1985 Council Meeting (Petitioner's Exhibit "D") shows that the concern was with the V.P.O.

Although Petitioners state that "the most important factor in our petition for a writ of mandamus" is that the findings are not supported by the evidence, this appears on page 39 of the points and authorities. The primary contention is that the staff report to the Commission recommends denial without any new evidence, citing *Rockshire Civic Assn. v. Mayor, et al* 358 A 2d 570, 580. The answer is that we are not now reviewing the action of the Staff or the Planning Commission but the action of the City Council. Certainly the Council was not bound by the findings or decision of either the Staff or the Planning Commission. At the City Council hearing *there was new evidence.* Although Petitioners describe the Staff as "experts" we routinely instruct jurors to give the opinions of "experts" only the weight to which they think it is entitled.

Petitioners argue strenuously that the "view loss is minimal" and in analyzing the City Council's deliberations point to the various comments of the Council members with respect to preserving the rural atmosphere. But "rural atmosphere" is an important part of the View Protection Ordinance (Section 1951).

Constitutionality

I am complimented by Petitioner's invitation to find the View Protection Ordinance unconstitutional. In a clear case I would not hesitate to do so, but in other cases

(such as this one) that decision should be made at the appellate level.

In determining the meaning of this ordinance, the problem is no different and no more difficult than the problem we regularly and confidently pass to our juries to determine what is "reasonable" conduct in a negligent action, what is "reasonable doubt" in a criminal case, what is "malice", what is "outrageous conduct" in a case involving a claim for intentional infliction of emotional distress, what is a "stable and significant relationship" supporting a claim for loss of consortium, and ad infinitum.

That men and women of reasonable minds may differ in their conclusions does not deter us from using these concepts.

With respect to the cases cited by Petitioners I note that they refer to standards for administrative agencies and not legislative ones; In the present case we are reviewing the action of a legislative body, the City Council, which exercises quasi-judicial powers in its review of the Planning Commission decision.

I do not agree with Petitioners argument that the V.P.O. constitutes an unconstitutional delegation of power by the City to the Homeowners Association or that the only power retained by the respondents is to

> "recommend mitigating measures and urge applicants to compromise with the homeowners association"

Inter ali, the V.P.O. does empower the Planning Commission, when a complaint has been filed to a proposed development by a person aggrieved, to

> "Coordinate and conciliate to the maximum extent possible the resolution of disputes among property owners concerning view obstructions."

That appears to be a reasonable and intelligent part of any dispute resolution system and is consistent with the expanding efforts to provide more efficient, prompter and less expensive methods than now exist. This includes the whole plan of commercial and judicial arbitration, mediation, neighborhood justice centers and related efforts.

Conclusion

I regret that Mr. and Mrs. Ross have been unable to implement their original plans. I can sympathize with a fellow Bruin. Also, it is regrettable that my good friend and courthouse neighbor, Judge Frank Baffa and his family, may no longer have the use of the Ross pool. However, I would advise Mr. and Mrs. Ross to approach this problem with the feeling that the City Council is attempting, in good faith, to resolve the conflicting interests involved in this case. Can the Petitioners live with the recommendation of the Planning Director:

> "That the Council stipulate as mitigating measures that the plans be revised to reduce the maximum height of the addition to 22'6" and that no second story be permitted over the garage."

A copy of this minute order mailed this date by U.S. mail to counsel as follows:

RICHARD R. TERZIAN, City Attorney
WEISMAN, BUTTLER AND WATSON

APPENDIX C

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR
No. B022314
(Super. Ct. No. SWC 83320)

W. KENNETH ROSS, *et al.*,
Plaintiffs and Appellants,

vs.

CITY OF ROLLING HILLS ESTATES, *etc., et al.*,
Defendants and Respondents.

NOT FOR PUBLICATION
IN THE OFFICIAL REPORTS

Filed: May 19, 1987

APPEAL from a judgment of the Superior Court of Los Angeles County. Abraham Gorenfeld, Temporary Judge.* Affirmed.

Weisman, Butler & Watson, Mark L. Weisman and Laurie J. Butler, for Plaintiffs and Appellants.

Richard R. Terzian, City Attorney, Adams, Duque & Hazeltine and Cristina L. Sierra, for Defendants and Respondents.

Appellants W. Kenneth Ross and Carole A. Ross appeal from a judgment entered in favor of respondents the City of Rolling Hills Estates (the City), the Planning

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*(Pursuant to Cal. Const., art. VI, § 21.)

Commission of the City of Rolling Hills Estates (the Commission), and the City Council of the City of Rolling Hills Estates (the Council) denying appellants' petition for writ of mandate. The mandate was sought to compel respondents to approve plans presented by appellants to expand and alter their home, located in the City. The writ also sought to compel the issuance of a variance to zoning ordinances concerning lot requirements. Principally at issue is a view protection ordinance of the City. We reject appellants' contentions that the ordinance is unconstitutionally vague and that the City abused its discretion in denying them a building permit[1] and a variance. Accordingly, we affirm.

Background

On December 21, 1984, appellants filed an application for a variance to permit a two-story addition to their home which would encroach into a code-required 15-foot street-side yard setback and to allow the proposed lot coverage to exceed the code permitted 30 percent limit. The Commission denied the zone variance request on May 20, 1985. No appeal was taken from this decision.

On June 6, 1985, appellants submitted revised plans for the addition to their residence. The revised plans eliminated the zoning violations and the need for any variance. Because the views of other property owners would be impaired to some degree, those owners were notified by the City of their right to file objections and to appear before the Commission. They filed objections to clearance of the revised plans. The Commission conducted a public hearing on August 19, 1985. It found that the proposed

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[1]1. The City's approval of plans was a precondition to the issuance of a building permit. We refer to the denial of approval of the plans as denial of a building permit, which was its practical effect.

addition did not conform to the objectives of the view protection ordinance and denied approval of the plans.

Appellants appealed the Commission's decision to the Council. The Council held a public hearing on October 10, 1985, and affirmed the decision of the Commission.

The View Protection Ordinance

Appellants' challenge to the ordinance asserts that due process is denied them because the ordinance language is unconstitutionally vague. This agrument is without merit. Appellants base the argument on semantic challenges to the ordinance's stated purposes and guidelines. The full text of the ordinance is set forth in the margin.[2] Thus,

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[2]1950. PURPOSES. The hillsides of the City constitute a limited natural resource in their scenic value to all residents of and visitors to the City and their potential for vista points and view lots. It is found that the public health, safety and welfare require prevention of needless destruction and impairment of views and promotion of the optimum utilization and discouragement of the blockage and misuse of such sites and view lots. The purpose of this ordinance is to promote the health, safety and general welfare of the public through:

"(a) The protection, enhancement, perpetuation and use of sites and view lots that offer views to the residents because of the unique topographical features which the Palos Verdes Peninsula offers, or which provide unique and irreplaceable assets to the City and its neighboring communities or which provide for this and future generations examples of the unique physical surroundings which are characteristic of the City.

"(b) The maintenance of settings which provide the amenity of a view.

"(c) The establishment of a process of design review by which the City may render its assistance toward the objective that views enjoyed by residents of the City will not be significantly obstructed.

"1951. EVALUATION AND REVIEW. To protect the visual quality of highly scenic areas and maintain the rural character of the

they argue that words such as "needless," "discourage," "view," "impairment" and "significantly obstructed," ap-

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City, new development should not degrade highly scenic natural historical or open areas and shall be visually subordinate to the scenic quality of these areas.

"New development within the various view sheds contained in the City that would have a significant visual impact to those living adjacent to the development, shall be subject to design review. This review shall ensure that development and its cumulative impact is consistent with the previously mentioned standards.

"The design procedures and standards employed in new developments, alterations and additions to existing structures and lots should include appropriate measures that are consistent with appearance and design goals of the View Protection Ordinance. Development proposals should be coordinated in order to:

"(a) Maximize open space preservation.

"(b) Protect view corridors, natural vegetation, land forms, and other features.

"(c) Minimize the appearance of visually intrusive structures.

"(d) Prevent the obstruction of property owners' views by requiring appropriate construction of new structures or additions to existing buildings or adjacent parcels.

"(e) Assess the potential view loss from public areas of any proposed major structures as well as alterations and additions to existing structures.

"(f) Determine whether other suitable design options are available to the property owner in order that view obstructions may be eliminated or lessened in severity.

"1952. CLEARANCE PROCEDURES. Should it appear that a potential view impairment may result from a proposed development, addition or alteration, the site shall be subjected to a View Preservation Site inspection. A fee shall be charged for such inspection as the City Council shall fix by resolution.

"1953. INSPECTION. Upon such inspection, should the City zone clearance official determine that the proposed development addition or alteration will impair a view site, the matter shall be

pearing in various portions of the text, do not provide sufficient guidance and are "unintelligible concepts."

The tests which apply when a statute or ordinance is challenged for vagueness are set forth in *Hand* v. *Board of Examiners* (1977) 66 Cal.App.3d 605, 620-621: "In *McMurtry* v. *State Board of Medical Examiners* (1960) 180 Cal.App.2d 760, 766-767 [4 Cal.Rptr. 910], the court stated various tests for vagueness: 'It is well settled that "a statute which either forbids or requires the doing of an

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referred for hearing and review by the Planning Commission pursuant to Sections 1954 and 1955 below.

"1954. ADMINISTRATION AND REVIEW. It shall be the duty of the Planning Commission to administer the provisions of the View Protection Ordinance. Review of any site for such purposes shall be initiated by the City pursuant to a View Preservation Site Inspection or otherwise, or by any person aggrieved.

"1955. POWERS AND DUTIES OF PLANNING COMMISSION. The Planning Commission shall hold a public meeting when complaint opposed to any pending development addition or alteration has been filed by a person aggrieved or referred by the City zone clearance official. In connection with the foregoing, the Planning Commission:

"(a) Shall hear and review such complaints or refrerrals regarding the proposed construction, alteration, or additions.

"(b) May request, following a public meeting, that proposed action on a particular site or plans to make any additions to existing structures or new accessory structures on the lot in question will meet the mitigation measures of the View Protection Ordinance as outlined by the Planning Commission.

"(c) Coordinate and conciliate to the maximum extent possible the resolution of disputes among property owners concerning view obstructions.

"1956. APPEAL. Any person aggrieved may appeal the Planning Commission decision to the City Council within twenty (20) days after determination of required view protection mitigation measures."

act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." [Citations.] This principle applies not only to statutes of a penal nature but also to those prescribing a standard of conduct which is the subject of administrative regulation. [Citations.] *The language used in such legislation "must be definite enough to provide a standard of conduct" for those whose activities are prescribed as well as a standard by which the agencies called upon to apply it can ascertain compliance therewith.* [Citation.] Approved rules by which to judge the sufficiency of a statute in the premises have been applied in numerous decisions, i.e., the words used in the statute should be "well enough known to enable those persons within its purview to understand and correctly apply them." [Citation]; words of long usage, or which have an established or ascertainable meaning in the profession or industry involved, or those which have been given a definite and restrictive interpretation by the courts, or the meaning of which may be determined from a fund of human knowledge and experience, will meet the test of certainty. [Citations]; if the words used may be made reasonably certain by reference to the common law, to the legislative history of the statute involved, or to the purpose of that statute, the legislation will be sustained [citations]; and a standard fixed by language which is reasonably certain, judged by the foregoing rules, meets the test of due process "notwithstanding an element of degree in the definition as to which estimates might differ. [Citations.]" ' (Italics added.)"

Applying these tests we do not find the ordinance to be too vague. A reasonably certain standard in light of the need for view protection can be determined. Indeed, we find it ironic that appellants, arguing in their reply brief that their house is located in a highly built-up residential

area and not an untouched scenic wilderness, choose to argue that this case involves only "a normal residential addition in an area where there is a scenic view already *significantly obstructed* . . . ." (Emphasis added.) That very underlined phrase, readily understood, is one they themselves challenge as too vague to be enforced.

While not itself a zoning ordinance, the view protection ordinance is closely related. "[A]substantial amount of vagueness is permitted in California zoning ordinances" in order to permit delegation of broad discretionary power to administrative bodies. (*Novi* v. *City of Pacifica* (1985) 169 Cal.App.3d 678, 682; and see *Piano* v. *State of California ex rel. New Motor Vehicle Bd.* (1980) 103 Cal.App.3d 412, 418.) The ordinance at issue passes muster.

Denial of Building Permit

Appellants' contention that respondents abused their discretion in denying appellants a building permit is based on three grounds: (1) that the Council based its decision on zoning criteria involving aesthetics which had not yet been adopted, rather than on the criteria established by the view protection ordinance; (2) that it failed to make findings sufficient to its decision; and (3) that its findings are not supported by the evidence.

The record here does not reflect that the City relied on criteria contained in future zoning regulations to deny appellants' proposal. The need to protect the rural character of the area, which is a stated goal of the view protection ordinance, was considered by the council members. While the mayor stated that he hoped that future residential zoning would address aesthetics, he also said

that he was not relying on aesthetics in voting to affirm.[3] This case is thus distinguishable from *Gabric* v. *City of Rancho Palos Verdes* (1977) 73 Cal.App.3d 183.

By affirming the Commission's decision, the Council in effect adopted its findings. (*Carmel Valley View, Ltd.* v. *Board of Supervisors* (1976) 58 Cal.App.3d 817, 823.) The testimony taken at the Council's public hearing was substantially the same as the evidence before the Commission, and merely reinforced the Commission's decision.

The Commission found that the proposal would have an adverse impact on existing views and that appellants had failed to provide design alterations to minimize the view impact of their proposal.[4] Those findings are sufficient to apprise the parties and the court of the basis for the City Council's action. (*Topanga Assn. For a Scenic Community* v. *County of Los Angeles*(1974) 11 Cal.3d 506, 514.)

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[3]The mayor stated: "[W]e hope that when we do our residential zoning . . . we get in the[re] some statement . . . [that] any new homes or any . . . additions to existing structures should be in keeping with existing structures . . . And while I don't want to get involved with the aesthetics at the moment, I certainly can't believe that this is in keeping with the size."

[4]The minutes of the Commission state: "After further discussion, it was the consensus of the COMMISSION *that the ridgeline height of the addition and the impact on existing views was of major concern.* COMMISSIONER GIULIANO stated that both sides of this issue should compromise and try to solve the problems at hand. COMMISSIONER SERVIS added that Mr. Ross' failure to provide design alterations to this proposal does not meet with the objective of the view preservation ordinance. There being no further testimony, COMMISSIONER SERVIS moved, seconded by COMMISSIONER RUTKOSKY THAT COMMISSION FOUND THE PROPOSED TWO STORY ADDITION AT 4667 ROLLANDO DRIVE DOES NOT CONFORM TO THE OBJECTIVES OR THE VIEW PROTECTION ORDINANCE AND BE DENIED." (Emphasis added.)

The trial court apparently determined, as we have done, that the Council in effect adopted the Commission's findings regarding impact on existing views and failure to mitigate that impact.

Appellants' contention that the findings are not supported by the evidence also lacks merit. In reviewing the administrative decision, the trial court properly applied the substantial evidence standard, resolving all reasonable doubts in favor of the administrative decision. (Code Civ. Proc., § 1094.5, subd. (c); *Topanga Assn. For a Scenic Community* v. *County of Los Angeles, supra,* 11 Cal.3d at p. 514.) The appellate court reviews the evidence by the same standard appropriate in the trial court. (*Schmitt* v. *City of Rialto* (1985) 164 Cal.App.3d 494, 501.)

The record discloses that the Council had before it appellants' proposal, a staff recommendation that mitigating factors be incorporated into the design from the City's planning director, graphs and photographs indicating the view of city lights from the impacted properties and the extent that the proposal would affect the view, and the testimony of Stan Crawford and Margaret Larson, who testified that their views from their residences would be affected by the proposed addition. That evidence supports findings of significant view impairment and of failure to mitigate the impact on existing views.

Denial of Variance

We do not consider the merits of appellants' contention that the City abused its discretion in denying them a variance, because the issue is not properly preserved. It will be recalled that the Commission initially denied appellants' request for a variance. That denial was appeal-

able to the Council under section 1898, subdivision (i) (1) of the City's Municipal Code.[5] No such appeal was taken. Therefore, appellants failed to exhaust their administrative remedies. (*Pan Pacific Properties, Inc. v. County of Santa Cruz* (1978) 81 Cal.App.3d 244, 249; *Roth* v. *City of Los Angeles* (1975) 53 Cal.App.3d 679, 686, 687.) When the matter from which an appeal *was* taken was before the Commission later no question of a variance was involved at all.

Since the variance ordinance (see fn. 5 *supra*) allows the Council to "cause any decision of the Planning Commission to be appealed" and since the ordinance also provides in the first sentence of section 1898 that the Council may under certain circumstances initiate proceedings for consideration of the granting of a variance, appellants naturally argue that one or the other of these provisions should be invoked to save this appeal. The fact is, however, that the Council did not cause the Commissions' decision to be appealed, nor did it initiate proceedings for the grant of a variance. The transcript of the proceedings before the Council has some language in it concerning appellants' swimming pool and deck, which were involved in the variance question. Toward the end of the hearing a Council member stated that view preservation was an important cornerstone "of our philosophy all along and that's why and therefore I move we deny it

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[5]Section 1898, subdivision (i) (1) provides: "The decision of the Planning Commission shall be final unless an appeal therefrom is taken to the Council, as provided for in this paragraph. Such decision shall not become effective for twenty (20) days from the date that the written decision has been made and notice thereof mailed to the applicant by registered mail, during which time written appeal therefrom may be taken to the City Council by the applicant or any other person aggrieved by such decision. The City Council may, upon its own motion, cause any decision of the Planning Commission to be appealed."

until such time as an amicable arrangement be agreed upon by the neighbors and the owner." The three other councilmen, including the mayor further discussed the matter, including both the swimming pool and the view, and then original councilman said "I would like to move that we uphold the Planning Commission's denial of the variance." In the context of the entire meeting and of the administrative record, it is clear that he merely misspoke himself. There had been no appealed denial of the variance request. What really occurred is reflected in the Council's minutes which reflect that the Council upheld the Commission's denial regarding the proposed two-story addition to appellants' house. No issue of a variance is properly before us.

Disposition

The judgment is affirmed. Respondents to recover their costs on appeal.

COLE, J.*

We concur:

KINGSLEY, Acting P.J.

McCLOSKY, J.

Butler & Watson Weisman
9777 Wilshire Blvd.
Suite 500
Beverly Hills, CA 90212

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* Assigned by the Chairperson of the Judicial Council.

APPENDIX D

2ND CIVIL NO.

B022314

In the Court of Appeal

OF THE

State of California

SECOND APPELLATE DISTRICT

W. KENNETH ROSS, etc., et al.,
Petitioners and Appellants,

VS.

THE CITY OF ROLLING HILLS ESTATES, etc., et al.,
Respondents.

Appeal from the Superior Court of Los Angeles County.
Hon. Abraham Gorenfeld, Judge Pro Tem.

APPELLANTS' OPENING BRIEF

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2ND CIVIL NO. B022314

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2ND CIVIL NO. B022314

In the Court of Appeal

OF THE

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W. KENNETH ROSS, etc., et al.,
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THE CITY OF ROLLING HILLS ESTATES, etc., et al.,
Respondents.

Appeal from the Superior Court of Los Angeles County.
Hon. Abraham Gorenfeld, Judge Pro Tem.

APPELLANTS' OPENING BRIEF

STATEMENT OF THE CASE

This case involves the primary issue of whether a municipal ordinance denominated by the City of Rolling Hills Estates as "View Protection Ordinance," Rolling Hills Estates Municipal Code, sections 1950-1956 (hereinafter "VPO") [Appendix, pp. 52-54] is unconstitutional in that it is so vague as to violate due process of law. It further involves the secondary issue of whether the municipal administrative bodies charged with administering the VPO and the other Rolling Hills Estates Municipal Code sections involved herein [Appendix pp. 55-95], prejudicially abused their discretion in denying appellants W. Kenneth Ross and Carole A. Ross a building permit to

erect an addition to their home and in denying said appellants a variance to retain their pool and decking. Appellants further seek a decision as to the remedy to which they are entitled upon a ruling in their favor.

Appellants are homeowners and reside at 4667 Rollando Drive, Rolling Hills Estates, California. Respondents are the City of Rolling Hills Estates (hereinafter "City"), a general law city, the City Council of Rolling Hills Estates, the administrative agency charged with administering the Rolling Hills Estates Municipal Code (hereinafter "Mun. C.") and the Planning Commission of the City, the administrative agency in charge of approving residential permit and variance applications when Mun. C., sections 1950-1956 are involved.

Appellants appeal from a judgment denying their petition for writ of mandamus under Code of Civil Procedure, section 1094.5 which judgment was filed on May 28, 1986. [Appendix pp. 384-386.] Such judgment was rendered after trial of the petition on April 1, 1986, before the Honorable Abraham Gorenfeld, Judge Pro Tem of the Superior Court. The effect of the judgment was to find the VPO constitutional and to further find that there was substantial evidence to support respondents' denial to appellants of a building permit and variance to retain their pool based on the VPO and Mun.C., section 1898. This appeal followed.

STATEMENT OF THE FACTS

On June 6, 1985, appellants submitted a proposal for an addition to their residence (hereinafter the "Proposal") to the Planning Department Staff of the City (hereinafter "Staff"). [Appendix, pp. 128-131.] The Staff found the Proposal to comply with all city zoning requirements but further found that views from two residences adjacent to

appellants could be affected somewhat. It then contacted the affected residents. [Appendix, pp. 354, 356.] On July 25, 1985, the Staff received letters of objection from these property owners, Mr. and Mrs. Stanley Crawford and Mrs. Margaret Larson. [Appendix, pp. 154, 155.]

As a result of receiving such letters, the Staff referred the Proposal to the Planning Commission for a determination on the potential view blockage issue, recommending that the Planning Commission approve the Proposal by minute action. [Appendix, pp. 151-152.] On August 19, 1985, the Planning Commission held a public meeting relative to the Proposal and denied approval. [Appendix, p. 161.] Appellants appealed this denial to the City Council. [Appendix, p. 162.]

On October 10, 1985, the City Council conducted a public meeting relative to the Proposal at which oral testimony, written and photographic evidence were received. [Appendix, pp. 96-110, 111, 115-121, 148-150, 228, 229-235.] Prior to this meeting, but subsequent to the August 19, 1985 meeting of the Planning Commission, the Staff Director sent a report to the Mayor of the City and to the City Council relative to the Proposal wherein he recommended certain actions be taken by the appellants in light of the VPO. [Appendix, pp. 165-168.] Said report did not make reference to the Staff's earlier report wherein it had recommended that the Planning Commission approve appellants' application for a building permit.

At the October 10, 1985 City Council meeting, appellants requested that the City Council: (1) approve their building plans, and (2) permit them to retain their swimming pool and decking. [Appendix, pp. 115-121.] The City Council tape recorded this meeting and a transcript, albeit containing a few gaps, was created. [Appendix, pp. 96-110.] Following the conclusion of the meeting,

the City Council voted to deny appellants' request for approval of their proposed addition and the right to retain their pool and decking. [Appendix, p. 110.]

ISSUES PRESENTED

The Court will be presented with the following issues in its determination of this appeal.

1. Is the view protection ordinance unconstitutional in that it is so vague as to violate due process of law?

2. Did respondents prejudicially abuse their discretion in denying appellants a building permit?

   a. Did respondents proceed in the manner required by law?

   b. Is the decision of respondents supported by the findings?

   c. Are respondents' findings supported by substantial evidence?

3. Was appellants' application for a variance to retain their pool and decking properly before and denied by the City Council and was such denial a prejudicial abuse of discretion?

4. Can this Court order respondents to grant appellants the requested building permit and variance to retain their pool and decking?

SUMMARY OF ARGUMENT

The VPO purports to regulate construction of new buildings and additions to existing structures insofar as such buildings and structures would have a significant visual impact to those living adjacent to the development. It is devoid of standards and guidelines as to what views

it is protecting and what would violate its terms. Such deficiencies render it unconstitutional because it is so vague as to violate due process of law.

Respondents' denial of appellants' Proposal constituted a prejudicial abuse of discretion because respondents failed to proceed in the manner required by law. Under the guise of comprehending and administering the VPO, they denied the Proposal. Their true reason for such denial, however, was a unanimous desire to legislate aesthetic restrictions not within their power.

None of the findings required to be made by an administrative agency functioning in a quasi-judicial capacity were made by respondents. This failure makes it impossible for a trial court and this Court to determine whether there exists substantial evidence to support the conclusion that the Proposal violates the VPO.

The findings, to the extent they bear upon the respondents' interpretation and administration of the VPO, are not supported by substantial evidence. The evidence presented to establish significant visual impact was highly suspect in that it was based primarily on emotionalism. The evidence presented by appellants, including determinations made by the Staff as to the percentage of view blockage, overwhelmingly demonstrated but a minor view loss.

Appellants' request for a variance to retain their pool and decking was by the City Council's own motion considered and ruled upon. It was denied after findings were made, which findings were not supported by substantial evidence. The appeal was properly made to the trial court because Mun. C., section 1898 does not provide for an appeal to any other body following a denial as was given here.

The Court of Appeal has the power to order that respondents grant appellants a building permit and the requested variance. *Gabric v. City of Rancho Palos Verdes* (1977) 73 Cal.App.3d 183, 196. Given such authority and given that upon this Court's finding that respondents prejudicially abused their discretion in denying appellants their requested permit and variance, such an order would meet the conditions of fair play mandated by *Gabric, supra.*

ARGUMENT

I

THE VIEW PROTECTION ORDINANCE IS UNCONSTITUTIONAL BECAUSE IT IS SO VAGUE AS TO VIOLATE DUE PROCESS OF LAW

It is clear that a constitutional challenge to a zoning ordinance must be made by means of a petition for writ of mandamus. *Agins v. City of Tiburon* (1979) 24 Cal.3d 266, 272-273. The VPO is a zoning ordinance since it purports to regulate the manner in which a person can use his or her property. This statute, however, is fatally deficient for the reason that it requires the doing of acts in terms so vague that men and women of common intelligence must necessarily guess at its meaning and differ as to its application. As such, it violates due process of law. *Wotton v. Bush* (1953) 41 Cal.2d 460, 464.

The delegation of an absolute legislative discretion to an administrative body is not proper. There must be ascertainable standards to guide those charged with administering the ordinance. *Id.* at 468. Respondents administered the VPO in such a manner as to demonstrate that they were virtually, unanimously unclear as to that which the VPO purports to regulate. They further were attempting to regulate based upon standards not then

enacted, but which were, at least, contemplated by the City's governing bodies.[1]

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[1]On July 6, 1986, the City enacted the "Neighborhood Compatibility" ordinance, Mun. C., section 1816. Such ordinance was under consideration at the time of the October 10, 1985 City Council meeting.

Within the City of Rolling Hills Estates, proposals for new residential construction any [sic] modification to existing structures typically are made for properties in established neighborhoods. It is important that future proposals for both new construction and modification to existing structures respect this established pattern of development, within the various neighborhoods, because such patterns are integral elements of the City's rural character. The provisions of this Section provide a review process for new residential construction and modification to existing structures within existing residential neighborhoods.

In addition to satisfying the pertinent requirements of the specific residential district the following design criteria and review processes are established to protect and maintain the established character of all residential neighborhoods in the City:

(A) OBJECTIVES. To maintain neighborhood compatibility, residential construction proposals shall address the following objectives:

(1) NATURAL AMENITIES. Improvements to residential property shall respect and preserve to the greatest extent possible, existing topography, landscaping and natural features.

(2) NEIGHBORHOOD CHARACTER. Proposals shall be compatible with the existing neighborhood character in terms of the following:

(a) Scale of development of surrounding residences.

(b) Architectural style and materials.

(3) SCALE. While many elements can contribute to the scale of a residential structure, designs should minimize the appearance of overbuilt property to both public and private view. The square footage of the residence and the total amount of lot coverage should reflect the rural character of the City, and the respective neighborhood.

The City adopted the VPO on April 25, 1978. [Appendix, p. 52.] Its terms are set out in Mun. C., sections 1950-1956. We are aware of no previous California administra-

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(4) STYLE. Proposals shall address the following design elements to ensure a compatible scale of development:

(a) Facade treatments shall be designed to avoid stark, unbroken exterior walls and in general, shall be compatible with facade treatments in the neighborhood.

(b) The height of structures shall reflect the rural character of the City as well as maintain consistency with neighboring properties.

(c) Open spaces between proposed structures and subject property lines shall reduce the appearance of an overbuilt lot.

(d) Roof design shall incorporate pitches so that they are a compatible feature of the neighborhood.

(e) The apparent bulk or mass of the structure shall be consistent with surrounding properties in the neighborhood.

(f) Any appurtenances incorporated into the design plan (including but not limited to: greenhouses, turrets, towers, chimneys, penthouses, solariums, porticos/loggias, atriums, garden walls and fences) shall be constructed so that they are compatible with the neighborhood.

(5) PRIVACY. Proposals shall preserve the open space and rural character of the surrounding neighborhood. Designs shall respect the existing privacy of surrounding properties by maintaining an adequate amount of separation between the proposed structure(s) and adjacent property lines. In addition, the design of balconies, decks and windows should also respect the existing privacy of surrounding properties.

(6) LANDSCAPING. Designs shall incorporate existing and additional landscaping to ensure compatibility with the surrounding neighborhood. Landscaping shall not be used to create hedges in front yard areas nor diminish the open, spacious character of a neighborhood.

(7) VIEWS. Designs should respect a neighbor's existing view(s) as required by the View Protection Ordinance, Section 1950.

tive or judicial interpretations of this ordinance or any

(B) PROCESS. The following requirements shall apply to all proposals for both construction and modification to existing structures for all residential properties:

(1) INITIAL REVIEW. Following the submittal of a proposal, the Planning Director shall review all requests for Zone Clearance. Approval shall be based on meeting the requirements of the objectives stated above in Section 1816(A), and the additional requirements of this Article.

(2) NOTICE. If the Planning Director determines that certain properties may be affected by a proposal, the Director shall require that owners of said affected properties are notified by mail, ten (10) days prior to the decision of the Director, when the Director determines the proposal is significant to warrant such notification.

(3) APPROVAL PROCESS. If the Planning Director does not determine that the objectives stated in 1816 (A) are met, the applicant may propose mitigating factors to the Planning Director. Once the Director determines the objectives are met, he shall render a written decision of approval. Notice of said decision shall be mailed to any party requesting such notice and any party previously given notice by the Director, under paragraph (2) above.

(4) APPEAL TO PLANNING COMMISSION. Any aggrieved party shall have the right to appeal the Planning Director's decision to the Planning Commission within twenty (20) days of the Director's written decision. The Planning Commission will then hold a public hearing. Notice of said hearing shall be mailed in accordance with the Public Hearing notification provisions of Section 1898 (e) of this Article.

(5) POWERS AND DUTIES OF THE PLANNING COMMISSION. The Planning commission shall hear and review all appropriate testimony regarding compliance with the Neighborhood Compatibility Ordinance. The Planning Commission may require any necessary design modifications to ensure that the proposal reflects the objectives of the Ordinance.

(6) APPEAL OF PLANNING COMMISSION DECISION. Any aggrieved party or the City Council, on its own

statutes similar to it which purport to regulate view protection concerns. As such, there is no interpretation to which we can look for guidance in determining if the VPO is so vague as to deny due process. Indeed, the State of California has only recently enacted a statute pertaining to the creation of easements for, *inter alia*, "light and air access" purposes. Govt. C. section 65871(a). Prior to the enactment of section 65871(a), the relevant enabling statute was Govt. C., section 65850 which nowhere mentions "light and air access." We, thus, do not have the benefit of *any* statute dealing with "view" concerns to guide interpretation herein.

Interpretation of the VPO must be limited to analogous case law and the plain meaning of the words of the VPO. In *Wotton v. Bush, supra*, the California Supreme Court was faced with the task of determining if a statute containing a phrase undefined by the Legislature was void for vagueness. It concluded that the phrase had an ascertainable meaning and was not void for uncertainty because it had previously been construed and interpreted administratively. *Id.* at 469. *See, also, State Board v. Thrift-D-Lux Cleaners* (1953) 40 Cal.2d 436.

In our case, we are met with an ordinance clothed with no previous interpretation. The VPO purports to regulate "view," at least that is its title. A careful reading of its terms, however, requires the conclusion that the VPO falls short of providing ascertainable standards for its understanding or its application.

In construing the VPO the agency charged with that role as well as the citizen doing the building, are required

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motion, may appeal the Planning Commission's decision to the City Council within twenty (20) days after the Commission renders said decision."

to understand the terms: "significant visual impact to those living adjacent to the development." Mun. C., section 1951, second paragraph. If new development has such "impact," it is subject to "design review." *Id.* There are no guidelines to tell the agency or the citizen contemplating the new addition whether height, design, style, color and/or choice of building material and landscaping will result in "significant visual impact." We submit there are no such guidelines in the VPO from which respondents could understand or administer the VPO on this point.

Further, and at the heart of this whole dispute, is the question of what is meant by the VPO when it speaks of "views"? Views of what? This is never defined and Judge Gorenfeld astutely focuses upon this issue when he states:

> "When we talk about a view obstruction, are we concerned about whether there is a view of the sky, or the ocean, or — . . .
>
> [Comments by Butler.]
>
> "Well, that is rather abstract, isn't it? Shouldn't we define what we are concerned about; whether we are talking about view, or are we talking about city lights, or the ocean, or the trees, or what? . . . Maybe the City can tell us what we are looking for." [Appendix, pp. 428-429.]

The City cannot and did not tell the Court or anyone else what the views pertain to because the VPO does not define this most central of terms. At the trial herein, counsel for respondents makes reference to the fact that some of the views are of the ocean, some are of the hills, and some are of city lights. [Appendix, p. 447.] Such statements represent his opinion, and perhaps that of some or all of respondents, but greater certainty must be

available to someone whose property rights are to be severely abridged by the application of such statute.

Turning to the comments elicited from the affected neighbors at the City Council meeting, the most extensive definition of view was offered by Mrs. Larson and included:

> "City lights, and some of the houses down on Marloma Street, the rooftops there and the trees." [Appendix, p. 106.].

Query, if a structure intrudes on a view of houses and rooftops but *not* trees or city lights, is it visually intrusive and does it have a significant visual impact? The VPO offers no guidance on this, a seemingly critical point capable of foreclosing a residential addition which otherwise wholly conforms to all municipal building code requirements. In *Gabric v. City of Rancho Palos Verdes* (1977) *supra*, at p. 196, the Court of Appeal found that the phrase "significant effect on the environment" standing alone without definitions, limitations or other guides is meaningless. "Significant visual impact," essentially, stands alone, is undefined and is part and parcel of no clear administrative standards or guidelines.

The courts do not routinely permit vague language to stand when such language is utilized by the specific administrative body to abridge individual rights. *See, e.g., California School Employees Assn. v. Foothill Community College Dist.* (1975) 52 Cal.App.3d 150, 155-156; *Jabola v. Pasadena Redevelopment Agency* (1981) 125 Cal.App.3d 931, 935-936.

While we accept that a less strict standard than that applied in the above two cases has been applied to zoning statutes in this state in determining whether they pass constitutional muster, none of the zoning cases decided in

this state permits language so inexact as to preclude a fair and consistent application of the particular ordinance. As was found in *Topanga Assn. For A Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 517:

> "A zoning scheme, after all, is similar in some respects to a contract; each party foregoes rights to use its land as it wishes in return for the assurance that the use of neighboring property will be similarly restricted, the rationale being that such mutual restriction can enhance total community welfare."

In the case at bar, one person's interpretation of what view is protected is permitted to cause a second person with a differing interpretation of view to forego developing his or her property. No guidance to either person is provided by the VPO. Further, while the VPO appears to govern "view" concerns, it also contains vague language dealing with general, residential aesthetic considerations nowhere defined in the VPO. What we are told in the VPO is that in the course of preserving view, development proposals such as that of appellants, must be considered with a view to:

(a) Maximize open space preservation.

(b) Protect view corridors, natural vegetation, land forms, and other features.

(c) Minimize the appearance of visually intrusive structures.

(d) Prevent the obstruction of property owners' views by requiring appropriate construction of new structures or additions to existing buildings or adjacent parcels.

(e) Assess the potential view loss from public areas of any proposed major structures as well as alterations and additions to existing structures.

(f) Determine whether other suitable design options are available to the property owner in order that view obstructions may be eliminated or lessened in severity. [Appendix, pp. 52-53.]

While we recognize that the VPO contains language purporting to govern the consideration of proposals which come under the VPO, we continuously return to the same inquiries. What is meant by a "visually intrusive structure"? What is "appropriate construction of new structures or additions to existing buildings or adjacent parcels"? What are the standards? What are the guidelines to make such determinations? There are no clear guidelines or standards and that is why this ordinance is so vague as to deny due process rights. This Court should find that this ordinance, like similar ones in other jurisdictions is, as a matter of law, unconstitutional. *See, e.g., Pacesetter Homes, Inc. v. Village of Olympia Fields.* (Ct.App.Ill. 1968) 244 N.E.2d 369; *City of West Palm Beach v. Duffey* (Supreme Ct. Fla. 1947) 30 So.2d 491.

II

RESPONDENTS PREJUDICIALLY ABUSED THEIR DISCRETION IN DENYING APPELLANTS A BUILDING PERMIT

Code of Civil Procedure, section 1094.5 governs challenges to final administrative orders or decisions made following a proceeding in which, by law, a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the administrative agency. One of the grounds of inquiry is

whether there is *any* prejudicial abuse of discretion. Abuse of discretion will be established if the respondent failed to proceed in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence. The standard or scope of review in the Court of Appeal is the same as that in the trial court. *Davis v. California Coastal Zone Conservation Com.* (1976) 57 Cal.App.3d 494; *Schmidt v. City of Rialto* (1985) 164 Cal.App.3d 494.

Respondents' decision to deny appellants' Proposal was a prejudicial abuse of discretion because respondents failed to proceed in the manner required by law. They based their decision *not* on the plain meaning of the VPO, to the extent that meaning could be interpreted and applied, but on a desire (later implemented in a far more specific aesthetic controlling ordinance, Mun. C., section 1816, *supra*), to legislate aesthetic restrictions not properly within their power or discretion. Further, they made none of the findings mandated under *Topanga Assn. For a Scenic Community v. County of Los Angeles, supra,* at 515.

The two other grounds supporting appellants' claim that respondents prejudicially abused their discretion are that the decision is not supported by the findings and the findings are not supported by the evidence. In finding to the contrary, the trial court erred. It did so, in part, by incorrectly concluding that the City Council was properly acting as a quasi-legislative agency in denying appellants' Proposal instead of as a quasi-judicial one. *City of Rancho Palos Verdes v. City Council* (1976) 59 Cal.App.3d 869, 876-889.

A. RESPONDENTS DID NOT PROCEED IN THE MANNER REQUIRED BY LAW

Throughout the entire process pursuant to which appellants sought approval for the Proposal, they fully complied with all of the City's administrative requirements. Respondents did not likewise proceed. Following the Staff's determination that the views of two of appellants' adjacent neighbors were impacted to some degree by the Proposal, the respondents embarked upon a similar game plan as was utilized in *Gabric v. City of Rancho Palos Verdes, supra,* which resulted in proceedings which were not in line with the law.

In *Gabric,* the City Council abused the appeal hearing process by using the occasion to decide whether the building of petitioner's two-story home would or would not have a significant impact on the environment and by using that decision to justify the denial of the permit simply because of a contemplated zoning action restricting two-story homes. In that case, there was no prohibition in any zoning ordinance or building code of the City against building the type or height of home which the appellant therein proposed. *Id.* at 190. The City's planning director had originally determined that the construction of the home would have no significant impact or effect on the environment. One neighbor objected and the matter was appealed first, albeit improperly, to the City's Environmental Assessment Committee and then to the City Council. The Court of Appeal held the latter appeal was proper. *Id.* at 191.

The *Gabric* City Council denied the appellant his building permit based on considerations having nothing to do with environmental impact. The City Council concluded that permitting a two-story home would "affect the character" of the neighborhood. Most of the evidence against

appellant had to do with zoning and nothing to do with environmental effect. The Court of Appeal concluded that "what was done by the City was an attempt to patch up a hole in the zoning law by misapplication of environmental considerations." *Id.* at 201.

In our case, Mayor Belsky made the following statements at the City Council hearing:

> "We hope that when we do our residential zoning which is all the various zones RA20, 15 and 10,000 we get in their [sic] some statement of what any new homes or any new structures, any additions to existing structures should be in keeping with existing structures and won't (?) aesthetics . . ." [Appendix, pp. 109-110.]

It seems clear that the Mayor was looking forward to some relatively clear zoning changes, undoubtedly Mun. C., section 1816, in ruling upon appellants' Proposal and was not basing his opinion on the VPO. The respondents, like the Rancho Palos Verdes City Council in *Gabric,* were letting their desire for the implementation of clear, governing aesthetic controls affect and guide their determination of the view protection issue. This constitutes an abuse of discretion and establishes that respondents did not proceed in a manner required by law.

Denying appellants' Proposal in our case and as was done in *Gabric* can effectively change the meaning of the zoning laws. "Such change is a proper subject for legislation, not piecemeal administrative adjudication." *Topanga Assn. For A Scenic Community v. County of Los Angeles, supra,* at 522. In *Gabric,* the Court of Appeal reversed the trial court decision of Judge Abraham Gorenfeld which upheld the City Council's action and ordered the City to

issue appellant therein his building permit. Such should be the same result in the case at bar.

The Court of Appeal in *Gabric* stressed the duty of the trial court to vigorously examine the record to determine not only if the findings support the decision of the City Council, but also to determine whether substantial evidence supports the "findings" of the City Council. The absence of *either* establishes abuse of discretion. *Gabric, supra,* at 193.

In our case, the City Council was acting in a quasi-judicial capacity, rather than in a quasi-legislative role as Judge Gorenfeld held. This is so because the City Council's dominant concern had to be a narrow and private one, *i.e.,* whether the Proposal violated the VPO as to the Crawfords and Mrs. Larson, instead of one encompassing broad and public concerns. A legislative act predetermines what the rules shall be for the general regulation of future cases falling under its provisions, while an adjudicatory act applies law to determine specific rights based upon specific facts ascertained from evidence adduced at a hearing. *City of Rancho Palos Verdes v. City Council, supra,* at 883; *Forstner v. City etc. of San Francisco* (1966) 243 Cal.App.2d 625, 632.

Judge Gorenfeld improperly found that respondent City Council was required to act in a quasi-legislative role. The true capacity in which respondent City Council was acting was quasi-judicial. In such a role, the City Council was required to set forth findings with the requisite specificity to "bridge the analytic gap between the raw evidence and ultimate decision or order." *Topanga Assn. For A Scenic Community v. County of Los Angeles, supra,* at 515. This requirement serves to conduce the administrative body to draw legally relevant sub-conclusions supportive of its ultimate decision; the intended

effect is to facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions. *Id.* at 516.

Such was not done by respondents in this case. Nowhere do we find the requisite findings to enable a reviewing court to determine whether there exists substantial evidence to support the respondent agency's findings. The Legislature in enacting section 1094.5 did not intend for the reviewing court to speculate as to the administrative agency's basis for decision, *Id.* at 515. Yet, that is precisely what the reviewing court was required to do here. There are virtually no findings directly relevant to the VPO in the record. It follows, then, that there can be but a "negative" answer to the question of whether the findings support the agency's decision. All of the above confirms and establishes the prejudicial abuse of discretion by respondents. A reversal is warranted as well as the awarding to appellants of the requested building permit.

B. THE RESPONDENTS' DECISION IS NOT SUPPORTED BY THE FINDINGS

The City Council voted to uphold the Planning Commission's denial of the Proposal. What were the Council's findings which led to its conclusion that the Proposal did not comply with the VPO? The sole findings which were filed on November 10, 1985 were as follows:

> 1. The view preservation is an important one and the appeal should be denied until an amicable compromise is reached between Mr. and Mrs. Ross and the neighbors (Architectural Review Committee);
>
> 2. Lot coverage requirements should be kept intact to keep the "rural" atmosphere and structures should not overwhelm the property;

3. It is important to maintain views and Mr. Ross should try to conform to coverage. Nothing would be gained by taking out the swimming pool and deck;

4. Property owners have rights, as long as they do not interfere with a neighbor's rights. In the General Plan, one of the basic purposes is stated as preserving the rural atmosphere and that this addition, as proposed, does not maintain the rural atmosphere. [Appendix, p. 112.]

Where is there a finding that the Proposal would have "a significant visual impact to those living adjacent to the development," whatever that means? Where is the finding that the Proposal constitutes "a visually intrusive structure," whatever that means? Where is the finding of what is the "potential view loss" which affected neighbors would experience by the addition to the existing Ross home? Where is the finding as to "whether other suitable design options are available to the property owner in order that view obstructions may be eliminated or lessened in severity"?

The answer to all of these questions is the same. There are no findings to reveal either that there was an orderly analysis by the City Council or which would enable a reviewing court to trace and examine that agency's mode of analysis. There are no findings which support the conclusion that the Proposal violates the VPO.

The record presented to the trial court required it to guess at the grounds for the respondents' decision. This Court is placed in the same speculating position. Absent findings which support the decision, Code of Civil Procedure, section 1094.5(b) requires that the reviewing court find a prejudicial abuse of discretion. Upon such a conclusion, appellants must be granted their building permit.

C. THE FINDINGS ARE NOT SUPPORTED BY THE EVIDENCE

Following a conclusion that the requisite findings upon which the respondents' decision is based are missing, it would seem an impossible task to ascertain what the evidence is that supports said findings, and, even more, whether such evidence is substantial. Giving respondents all benefit of the doubt with respect to such evidence, there is still a paucity of proof of a violation of the VPO by appellants. What "proof" we are given are the statements of Mrs. Larson and the Crawfords, all of which are extremely inexact when measured against clear, photographic evidence showing the actual height of the addition. How did the Crawfords and Mrs. Larson calculate their view loss? How were they able to ascertain exactly what objects of view would be lost? Are their feelings and opinions substantiated by any sort of objective measurement data the equivalent of substantial evidence? The answer must be no.

The nagging concern which respondents ask this Court to ignore is how does one come to terms with the Staff's earlier report to the Commission that there is no significant view blockage? The Staff had before it all the Crawford and Larson complaints when it issued the report recommending approval by minute action.

It appears the respondents would have us conclude that *any* evidence of *any* blockage of *any* view is substantial evidence that the Proposal violates the VPO. This should not be the law and cannot be permitted even if it is the law.

Respondents strenuously argued and objected when Judge Gorenfeld suggested a viewing of the "view site." [Appendix, pp. 435-441.] What immediately comes to

mind after the voicing of such objections is the question, "What were they afraid of"? Respondents had seen this view site at least once and considered same in denying appellants' Proposal. [Appendix, pp. 101, 336-367.] Their challenge that the Court's own viewing would be improper had no foundation since a prior viewing of the view site was part of the record.

It seems more likely that respondents' true basis for denying the Proposal had little to do with the VPO and everything to do with the contents of Mun. C., section 1816. The respondents simply disliked the aesthetics of the addition. The view question was not the basis for the denial. The substantial evidence necessary to sustain the findings (or rather implied findings of violation of the VPO) is not present. The respondents prejudicially abused their discretion and appellants should be awarded their building permit.

III

APPELLANTS' APPLICATION FOR A VARIANCE TO RETAIN THEIR POOL AND DECKING WAS PROPERLY BEFORE AND WAS DENIED BY THE CITY COUNCIL AND SUCH DENIAL WAS A PREJUDICIAL ABUSE OF DISCRETION

Municipal Code, section 1898 provides in pertinent part:

> "When practical difficulties, unnecessary hardships or results inconsistent with the general intent and purpose of this Article occur by reasons of the strict interpretation of any of its provisions, the Commission or Council, *upon its own motion,* may . . . initiate proceedings for consideration of the granting of a variance from the provisions of this Article under

> such conditions as may be deemed necessary to assure the intent and purpose of the Article be observed and that the health, safety, and public welfare be secured and that substantial justice be done, not only to the applicant but to persons other than the applicant who might be affected by said variance. . . ."

It is based upon this Article that appellants have properly brought the issue of respondents' denial of their request for a variance to be able to retain their pool and decking before this reviewing court. The City Council is granted the power to initiate variance proceedings on its own motion under appropriate conditions. The Council voted to uphold the Planning Commission's denial of the Variance. [Appendix, p. 110.] The Council made specific findings relative to "lot coverage" requirements which could only pertain to the pool and decking since the Proposal involved no variance. [Appendix, p. 112.] Councilwoman Mirels found that nothing would be gained by taking out the pool and decking. [Appendix, p. 112.]

Respondents earlier argued that until appellants have appealed the variance denial to the City Council and thereby exhausted their administrative remedies, this Court has no jurisdiction to act with respect to the Planning Commission's decision to deny the variance. [Appendix, p. 293.] This misstates the procedural posture of appellants' application for the variance. The application for the variance was *initiated* on the City Council's own motion at the December 10, 1985 meeting. That application was a *de novo* one and had nothing to do with the Planning Commission's denial. There is no provision in Mun. C., section 1898 for an appeal of the City Council's denial of a variance when such variance application is initiated on the City Council's own motion. Accordingly,

the appeal of the denial to the Superior Court is proper and this Court has jurisdiction to determine whether the Council prejudicially abused its discretion in denying the variance.

The denial was a prejudicial abuse of discretion because the level of hardship demonstrated in favor of granting the variance was unprecedented. Appellants were seeking to keep their pool and decking and obtain approval of the Proposal. No resident of the City had ever had been required to remove a pool when adding on to his or her residence. [Appendix, p. 126.] The lot was substandard (about 15,000 square feet below the current minimum standard for this zone (RA 20,000), thus permitting less space to build and recreate upon than that enjoyed by most of the City's residents. [Appendix, p. 122.] No Councilmember found that the City would gain by forcing appellants to take out their pool and decking.

There were no findings supporting the decision to deny the variance and there was no substantial evidence to support the findings. The greater part of the evidence went in favor of retaining the pool and decking. No one found that the variance was out of line with Mun. C., section 1898 as required by *Topanga Assn. For A Scenic Community v. County of Los Angeles, supra.*

The City Council abused its discretion in denying the variance and this Court should order that the variance be granted.

IV

THIS COURT CAN ORDER RESPONDENTS TO GRANT APPELLANTS THE REQUESTED BUILDING PERMIT AND VARIANCE

This Court has the power and authority to order that respondents grant appellants their requested building permit and variance. Respondents dispute same relying upon Code of Civil Procedure, section 1094.5(f) and the theory that by so ordering, the court would be improperly limiting or controlling respondents' discretion. Such argument is directly refuted by *Gabric v. City of Rancho Palos Verdes, supra,* which holds that where the City wrongfully denies a building permit, the City should apply the law in effect at the time of the administrative appellate review by the City Council, and grant the building permit. *Id.* at 203.

In the *Gabric* case, as in ours, a new statute, Mun. C., section 1816, purporting to regulate more extensively that which the ordinance under review was supposedly regulating, was passed following the City Council hearing but prior to the decision of the reviewing Court. In *Gabric,* the respondents attempted to restrict the granting of such permit based on the applicability of the new law. The Court denied such attempts and found that the fact that the ordinance was passed after final adjudicative decision "cannot support denial of appellant's application for permit nor the petition for writ of mandamus in the trial court." *Id.* at 203; *Keizer v. Adams* (1970) 2 Cal.3d 976; *McCombs v. Larson* (1959) 176 Cal.App.2d 105.

A further ground for this Court's granting appellants their permit and variance is an ordinary sense of fair play. Appellants followed the City's rules to the letter. Yet, they were refused the benefit of due process by being

subjected to an unconstitutionally vague statute and a decision-making process devoid of the legal protections required by statutory and case law. Just as in *Gabric*, appellants were not and are not developers of a large tract who will march out and erect a structure which violates the height restrictions of existing zoning ordinances. Appellants will not erect a structure which will be less attractive than the others in the neighborhood.

Appellants' building plans comply with all applicable zoning laws. The application of the old ordinance so as to permit appellants their addition will not change the character of the area as there are already several two-story homes in the Marloma area and the facade treatment is consistent with the present structure. [Appendix, pp. 228-235.] The differences between what section 1816 permits and what appellants seek are minor.

Appellants are entitled to the permit and variance because respondents prejudicially abused their discretion in denying same. Respondents should have granted appellants the permit and variance because the Proposal did not violate the VPO. There is no substantial evidence supporting findings to that effect and there are *no* findings supporting the denial. There remains no discretion which is to be controlled by this Court and appellants should be given their permit and variance.

V

CONCLUSION

Based on each of the foregoing reasons, the judgment appealed from must be reversed and appellants should be granted their building permit and variance.

DATED: January 20, 1987

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On January 20, 1987, I served the within Appellants' Opening Brief in re: "W. Kenneth Ross v. The City of Rolling Hills Estates" in the Court of Appeal, Second Appellate District, State of California, 2nd Civil No. B022314; and Appendix thereto;

on the Parties in said action, by placing one copy thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on January 20, 1987, at Los Angeles, California

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APPENDIX E

2ND CIVIL NO.

B022314

In the Court of Appeal

OF THE

State of California

SECOND APPELLATE DISTRICT

W. KENNETH ROSS, etc., et al.,

Petitioners and Appellants,

VS.

THE CITY OF ROLLING HILLS ESTATES, etc., et al.,

Respondents.

Appeal from the Superior Court of Los Angeles County

Hon. Abraham Gorenfeld, Judge Pro Tem.

APPELLANTS' REPLY BRIEF

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2ND CIVIL NO. B022314

IN THE COURT OF APPEAL

OF THE

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

W. KENNETH ROSS, etc., et al.,

Petitioners and Appellants,

VS.

THE CITY OF ROLLING HILLS ESTATES, etc., et al.,

Respondents.

Appeal from the Superior Court of Los Angeles County
Hon. Abraham Gorenfeld, Judge Pro Tem.

APPELLANTS' REPLY BRIEF

I

The View Protection Ordinance Is So Vague And Ambiguous That It Could Not Rationally Be The Basis For Denial Of Appellants' Design Proposal

The View Protection Ordinance ("VPO") at issue here is so vague and misleading that by its very terms it cannot provide a rational basis for the denial of approval of Appellants' design proposal. Therefore, such denial was reversible error.

The VPO itself vaguely declares that its purposes are (1) to prevent "*needless* destruction and *impairment* of

views," (2) to *discourage* "the *blockage* and *misuse* of . . . view lots," (3) to protect view lots that offer views to the residents, (4) to maintain settings which "provide the *amenity* of a view and (5) (perhaps most vaguely of all, and certainly most misleading of all) to establish a process of design review by which the City may render its assistance . . . that views . . . will not be *significantly obstructed.*" (Emphasis added) Appellants' Appendix, p. 52.

The VPO, which purports to affect important property and personal rights, nowhere offers guidance as to the possible meaning of the critical terms "needless," "discourage," "misuse," "amenity," "view," "blockage," "impairment," or "significantly obstructed" and, as such, is a veritable jumble of overlapping, contradictory and unintelligible concepts.

As clearly shown by the photographs in Appellants' Appendix, pages 229 to 235, the general area affected by Appellants' proposed improvements is already a highly built-up residential area, a far cry from the untouched scenic wilderness implied by the laudable goals, yet self-serving preamble, of the VPO.

In fact, the generalized wording of the VPO, coupled with Respondents' characterization of its scope, could lead to the erroneous conclusion that this case is analogous to protecting Yosemite from a giant phosphorescent advertising sign on the top of El Capitan. Instead, *this case involves no more factually than the construction by Appellants of a normal residential addition in an area where there is a scenic view already significantly obstructed by trees, roof tops and vehicles.*

Even if the VPO were clear and unambiguous, which it is not, the undefined terms such as "view" and "significantly obstructed," etc., would be construed by any rea-

sonable person to apply to the hillsides as they stand developed and built on as of the time of Appellants' submission of their design proposal. Furthermore, it is clear (Appellants' Appendix, pp. 128 to 131) that the improvements proposed by Appellants are *de minimis* as to their potential effect on such vaguely circumscribed and utterly subjective concepts as "scenic value," "misuse of view lots" and "significant obstruction," upon the basis of which undefined concepts the VPO purports to deny Appellants the improvements to their home.

The California Supreme Court, in *Topanga Assn. For A Scenic Community v. County of Los Angeles,* (1974) 11 Cal.3d 506, made it clear that "the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order. . . . Reference, in Code of Civil Procedure, Section 1094.5, to the reviewing court's duty to compare the evidence and ultimate decision to '*the* findings' (italics in original) we believe leaves no room for the conclusion that the Legislature would have been content to have a reviewing court speculate as to the administrative agency's basis for decision." *Id.* at 515.

Yet, this is exactly the task being demanded of this court by Respondents, in view of the fact that the City Council's ruling is unsupported by any findings. Instead, Respondents are obliged to rely solely upon fragments, comments and garbled transcriptions of the hearing of the matter on October 10, 1985. (Appellants' Appendix, pp. 96-109.)

> As stated by the *Topanga* court, "[a]mong other functions, a findings requirement serves to conduce the administrative body to draw legally relevant subconclusions supportive of its ultimate decision; the intended effect is to facilitate orderly analysis and

> minimize the likelihood that the agency will randomly leap from evidence to conclusions. . . . Absent such roadsigns, a reviewing court would be forced into unguided and resource-consuming explorations; it would have to grope through the record to determine whether some combination of credible evidentiary items which supported some line of factual and legal conclusions supported the ultimate order or decision of the agency. Moreover, properly constituted findings enable the parties to the agency proceeding to determine whether and on what basis they should seek review. . . . They also serve a public relations function by helping to persuade the parties that administrative decision-making is careful, reasoned, and equitable." *Id.* at 516-517.

In the case of Appellants' submission, the total absence of findings is fatal to Respondents' position, since, even if "substantial evidence" exists for the denial of design approval (which is denied by Appellants), this Court would be required to pick through the City Council transcript to find and consider such evidence.

In fact, Appellants submit that the very vagueness and subjectiveness of the statutory language, with its "amenities," its "views," its "discouragement of impairment," and the like, render any proper findings impossible. The closest thing to findings anywhere in the record is the denial of the appeal in the City minutes, found at pages 112-114 of Appellants' Appendix. These are not described as "findings," but are, clearly, simply the result of a discussion and vote of the City Council, on or about November 10, 1985.

Thus, Councilman Muller states his opinion that "view preservation is important" and "felt" that the appeal

should be denied until an amicable compromise could be reached. That is not a finding.

Councilman Schwarzmann then made an irrelevant comment about lot coverage requirements, stated that structures should not "overwhelm" the property and commented about the "rural atmosphere." Such statements could cause one to almost overlook the fact that we are talking about suburban Los Angeles. Again, the comments are not a finding.

Similarly, Councilwoman Mirels stated her agreement with her two colleagues and added that "it is important to maintain views." Again, no finding.

Finally, Mayor Belsky expressed his opinion that "property owners have rights" (without expressing his opinion as to which property owners he was referring) and added another comment about the "rural atmosphere." Again, no finding.

Thus, pure and simple, this court is asked, in defiance of the clear teaching of *Topanga*, to pick through the transcript of the City Council meeting and locate the findings (they are not there) and/or to transmute the Councilmembers' later comments, feelings and opinions into findings. Clearly, this court should decline the invitation and grant this appeal.

II

Substantial Evidence Was Not Presented To Justify Respondents' Denial Of Appellants' Design Proposal

The principal outcry against Appellants' design proposal and the only evidence Respondents were permitted to consider from the public under the VPO comes from the

two "adjacent" neighbors, the Crawfords and Mrs. Larsen.

The present "view" from the Crawfords' residence is seen in the photograph at Appellants' Appendix, page 148. Their "view" is already "impaired," unless one is willing to ignore the plainly visible fact that within a *maximum* "view" area of about 80-100 degrees there are already several roofs and a rather distant and hazy view of sky, city lights and buildings, only partially visible over the large roof in the middle, which is the Murdock home.

This is not substantial evidence of the fact, even under the hopelessly vague "test" of the VPO, that the Crawfords' "view" will be in any way "significantly obstructed," "blocked," "impaired," or become lacking in "amenity."

Appellants have resided in Rolling Hills Estates for many years, plan to stay in the community and have no desire to mar the beauty of their chosen home and its surroundings. Appellants do, however, have a growing family with significant needs for increased living space. They own a substandard size lot in this area with features severely restricting its development. (Appellants' Appendix pp. 100, 122, 126) Appellants' proposed improvements only nominally affect about an 8% space of the Crawfords' view," (Appellants' Appendix, p. 106) which percentage is hardly the equivalent of a significant obstruction.

As for Mrs. Larsen, her "view" (Appellants' Appendix, p. 106) is even less "visually impacted" because Appellants' improvements, can only logically affect, to a minor extent, the "view" she enjoys from her bedroom. The remainder of said view is only one of trees, and, particularly, Appellants' trees, to which no one has objected in this proceeding. It is Mrs. Larsen's own testimony, how-

ever, (Appellants' Appendix, p. 106) which shows what she is really concerned about, namely, that, "[p]articularly in the area where I am the most, in the kitchen and the front room, *it would be just smack across the street and I would see that....* [Emphasis added] An *objective* review of what is *actually* the view impacted by the Ross design proposal shows that Mrs. Larsen is primarily upset about the size of the structure. She never refers to where the *view* truly is and her distress has to do more with the bulk of the improvement since her preceding statements on page 106 deal extensively with the size of the Ross house and the size of other houses in the neighborhood.

Where in that testimony, therefore, can there be found a single bit of evidence, even under the vague VPO, of *"significant obstruction"* or of impairment, sufficient either to satisfy the VPO or to offset Appellants' reasonable and necessary rights to improve their residence? Where in the VPO is there to be found any legal or any linguistic basis for expanding the common meaning of the word "view" to include one's neighbor's improvements "smack across the street"? The answer to these questions is the same. There is no significant view obstruction and no substantial evidence to show same.

III

The VPO Is Invalid As To Appellants

The VPO provides neither the applicant nor the administrative officials with sufficient guidance as to its scope, meaning and the circumstances under which to invoke it to deny applications or to grant them under its authority.

The principle of judicial restraint with respect to judicial review of administrative action is based almost en-

tirely upon the premise that the administrative guidelines under which the administrators operate will be intelligible to them and to the public.

In the case at bar, as is clearly demonstrated by the comments of the Councilmembers at page 112 of the Appellants' Appendix, the VPO sets forth no standards about which reasonable persons can agree. The applicant, on the one hand, even after careful reading of the statute is necessarily put to the expense, delay, uncertainty and inconvenience of proceeding with an application under a statute without guidelines, but, under the mistaken assumption that the City will assist in complying with the statute. The administrators, on the other hand, having no guidelines under the statute will, because of their elective position, and because of the inherent ambiguity of the statute, deny applications except with respect to the most innocuous and uncontroversial improvements. It is not the purpose of the courts to uphold and enforce the *in terrorem* effect and operation of such a statute.

Virtually every administrative agency at the federal, state, county and municipal level in the United States is required by custom, by enabling statute and/or by judicial decision to promulgate and administer administrative regulations which are as intelligible and predictable in their impact upon the citizen as is reasonable under the circumstances.

Respondents themselves have implicitly recognized this fatal flaw in the VPO by having subsequently amended it to provide exhaustive details as to what they really mean. The VPO, however, is invalid as to Appellants for the reasons stated and it would be a travesty of justice, a travesty of judicial review and a taking of property without due process to allow this case to remain where it stands as of the date of this appeal.

IV

This Court Can And Should Order That Appellants Be Awarded The Remedy They Seek

Respondents argue that Appellants have no right to an order from this Court that they be awarded a building permit. Appellants recognize that they were refused the right to be granted a building permit by virtue of the application of the VPO and that the stage of the administrative proceedings where the guillotine fell was in the denial of their design proposal. Yet, and has never been disputed by Respondents, there is the fact that if the VPO were not involved, Appellants' plan "could have been approved without formal notification to the neighborhood." (Appellants' Appendix, p. 152, 4th paragraph). "Where the record of the administrative proceedings requires as a matter of law that a particular determination be made, the Court may order that the agency carry out its legal obligation." *Ross General Hospital, Inc. v. Lackner* (1978) 83 Cal.App.3d 346, 354.

It is clear from the factual recitation provided us by the Planning Department in its August 13, 1985 Memorandum to the Planning Commission (Appendix, pp. 151-152) that the Ross Proposal "met all zoning requirements, including setback and lot coverage standards." The Staff further found that the Ross Proposal "met all City zoning and development standards."

Therefore, should this Court find that the ordinance under which Appellants were denied their right to seek a building permit was void for vagueness, the sole remedy which is fair and reasonable and mandated by Section 1094.5 is to order that the City grant Appellants the right to obtain their building permit, since obtaining the same requires the exercise of no discretion by Respondents.

Appellants disagree that there is nothing in the record to show that respondents were basing their decision on any statute but the VPO. The Statements of Mayor Belsky clearly contemplate new zoning relative to residential aesthetic standards. (Appellants' Appendix, pp. 109-110). Further, prior to October 10, 1985, the City Council raised questions as to the effectiveness of the existing residential development standards and such new standards were considered in September, 1985 by the Planning Commission.

It is not as Respondents would have this Court believe a "last ditch effort to find any possible legal ground for reversal" to argue that what took place in *Gabric v. City of Rancho Palos Verdes* (1977) 73 Cal.App.3d 183, may also have occurred here. It is further neither wrong nor inappropriate to engage in the same balancing and fairness test as was done in *Gabric* to fashion the fairest remedy. Appellants should be awarded: (1) a reversal of the trial court's order and (2) an order from this Court that the design proposal be approved.

This ruling is necessary to do justice and protect property rights of all concerned. Appellants acknowledge that property rights and zoning matters do not often rise to the level of First Amendment rights. Nevertheless, property rights have received more careful scrutiny when a taking without just compensation occurs (as here) in violation of the Fifth Amendment to the United States Constitution. *See, e.g. Nollan v. California Coastal Commission*, on *certiorari* to United States Supreme Court, Slip No. 86-133.

CONCLUSION

For the reasons stated, this appeal and the remedies sought by Appellants hereunder should be granted.

DATED: April 27, 1987

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On April 27, 1987, I served the within Appellants' Reply Brief in re: "W. Kenneth Ross vs. The City of Rolling Hills Estates" in the Court of Appeal, Second Appellate District, State of California, 2nd Civil No. B022314;

on the Parties in said action, by placing One copy thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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111 North Hill Street
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I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on April 27, 1987, at Los Angeles, California

CE CE MEDINA

APPENDIX F

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
CLAY ROBBINS, JR., CLERK

DIVISION: 4 DATE: 06/01/87

B022314
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RE: Ross, W. Kenneth & Carole A.
vs.
Rolling Hills Estates, City of, Et Al.

2 Civil B022314
Los Angeles No. SWC83320

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR
CERTIFIED FOR PUBLICATION

W. KENNETH ROSS, *et al.*,
Plaintiffs and Appellants,

vs.

CITY OF ROLLING HILLS ESTATES, *etc., et al.*,
Defendants and Respondents.

No. B022314
(Super. Ct. No. SWC 83320)
(Abraham Gorenfeld, Judge)
ORDER FILED June 1, 1987

THE COURT:*

Good Cause Appearing, the opinion in the above entitled case, filed May 19, 1987, is ordered published in the official reports.

---

*KINGSLEY, Acting P.J., McCLOSKY, J., COLE, J.**

**Assigned by the Chairperson of the Judicial Council.

APPENDIX G

2ND CIVIL NO.

B022314

In the Supreme Court

OF THE

State of California

W. KENNETH ROSS, etc., et al.,
Petitioners and Appellants,

VS.

THE CITY OF ROLLING HILLS ESTATES, etc., et al.,
Respondents.

PETITION FOR REVIEW

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2ND CIVIL NO. B022314

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2ND CIVIL NO. B022314

In the Supreme Court

OF THE

STATE OF CALIFORNIA

W. KENNETH ROSS, etc., et al.,
Petitioners and Appellants,

VS.

THE CITY OF ROLLING HILLS ESTATES, etc., et al.,
Respondents.

PETITION FOR REVIEW

STATEMENT OF THE CASE

This case involves the novel issue of whether a municipal ordinance denominated by the City of Rolling Hills Estates as "View Protection Ordinance," Rolling Hills Estates Municipal Code, sections 1950-1956 (hereinafter "VPO")[1] is unconstitutional in that it is so vague as to violate due process of law and its application to appellants results in a taking of property without either due process of law or just compensation. This is a case of first impression. There are no California cases wherein a homeowner has challenged the constitutionality of a municipal view protection ordinance. This case further presents one of the first instances in which a homeowner deprived of the use of his land is seeking review, reversal and remand under the recent United States Supreme Court case of *First English Evangelical Lutheran Church of Glendale v.*

[1]The full text of the ordinance is set forth on pages 3-6 of the Opinion of the Court of Appeal herein which is attached hereto.

Los Angeles County, California (June 9, 1987) 85-1199, 87 Daily Journal D.A.R. 2974 (hereinafter *"First English"*).

Appellants are homeowners and reside at 4667 Rollando Drive, Rolling Hills Estates, California. Respondents are the City of Rolling Hills Estates (hereinafter "City"), a general law city, the City Council of Rolling Hills Estates (hereinafter "Council"), the administrative agency charged with administering the Rolling Hills Estates Municipal Code (hereinafter "Mun. C.") and the Planning Commission of the City (hereinafter 'Commission"), the administrative agency in charge of approving residential permit and variance applications when Mun. C., sections 1950-1956 are involved.

On May 28, 1986, the trial court filed a judgment denying appellants' petition for writ of mandamus under Code of Civil Procedure, section 1094.5. On August 1, 1986, appellants filed their Notice of Appeal. The appellate court heard oral argument and on May 19, 1987, filed its decision affirming the decision of the trial court and ordering that the opinion not be published in the official reports. Following a letter to the Court of Appeal by appellants requesting that said opinion be published, the Court of Appeal ordered such publication on June 1, 1987. The effect of the judgment was to find the VPO constitutional and to further find that there was substantial evidence to support respondents' denial to appellants of a building permit and variance to retain their pool based on the VPO and Mun. C., section 1898. This appeal followed.

STATEMENT OF THE FACTS

On June 6, 1985, appellants submitted a proposal for an addition to their residence (hereinafter the "Proposal") to the Planning Department Staff of the City (hereinafter "Staff"). The Staff found the Proposal to comply with all

city zoning requirements but further found that the views of two other property owners living adjacent to appellants could be affected somewhat. The Staff notified those property owners of their right to file objections and appear before the Commission. Those property owners filed objections to the Proposal and the Commission conducted a public hearing on August 19, 1985. The Staff recommended that the Commission approve the Proposal by minute action, however, the Commission denied approval of the Proposal.

Appellants appealed the Commission's decision to the Council and on October 10, 1985, the Council held a public hearing at which it affirmed the decision of the Commission. Prior to this meeting, but subsequent to the August 19, 1985 meeting of the Commission, the Staff Director sent a report to the Mayor of the City and to the Council relative to the Proposal wherein he recommended certain actions be taken by the appellants in light of the VPO. Said report did not make reference to the Staff's earlier report wherein it had recommended that the Commission approve appellants' application for a building permit.

ISSUES PRESENTED

The sole issues presented to the Court by this petition are whether the view protection ordinance is unconstitutional in that it is so vague as to violate due process of law, whether it results in a taking of appellants' property without due process of law and whether appellants are entitled to compensation for such temporary regulatory taking.

SUMMARY OF ARGUMENT

The VPO purports to regulate construction of new buildings and additions to existing structures insofar as such buildings and structures would have a significant visual impact on those living adjacent to the development. It is devoid of standards and guidelines as to what views it is protecting and what would violate its terms. Such deficiencies render it unconstitutional because men and women of common intelligence must necessarily guess at its meaning and differ as to its application. As such, it is so vague as to violate due process of law. The VPO is further unconstitutional because it permits a regulatory taking of property without due process of law and without just compensation. The VPO so restricts the use of appellants' property and so depreciates the property's value that it must be held to be invalid and unconstitutional and constitutes an improper and uncompensated regulatory taking.

ARGUMENT

I

THE VIEW PROTECTION ORDINANCE IS UNCONSTITUTIONAL BECAUSE IT PROVIDES INSUFFICIENT GUIDELINES AS TO ITS MEANING AND APPLICATION

Appellants' Proposal for the construction of the desired addition to their residence was found by the Staff to impair views of two adjacent residents. Appellants' Proposal was further found by the Staff to comply with all applicable zoning requirements and all community development standards. Nonetheless, the Commission and the Council denied approval of the Proposal based upon its failure to conform to the objectives of the VPO. The

confusion as to the meaning and application of the VPO is most prominently illustrated by the diametrically opposite conclusions reached by the Staff and the Commission and Council.

Where "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application [that statute] violates the first essential of due process of law." *Hand v. Board of Examiners* (1977) 66 Cal.App.3d 605, 620-621. The VPO suffers from these maladies and, as such, violates due process of law. As the *Hand* case continues, "the language used in such legislation 'must be definite enough to provide a standard of conduct' for those whose activities are prescribed as well as a standard by which the agencies called upon to apply it can ascertain compliance therewith. [Citation.]" *Id.* In this case, the language used does not provide the requisite standard of conduct to enable the City to "ascertain compliance therewith."

The Court of Appeal has found that the VPO passes constitutional muster; we strenuously disagree. The VPO sets forth laudable goals in its preamble, Mun. C., section 1950, but nowhere tells a homeowner in clear terms what the "views" it is attempting to protect purport to include. The VPO speaks of the hillsides as providing potential for vista points and view lots, yet, again, vista points and view lots of what?

In subpart (a) of section 1950, the VPO refers to "unique topographical features which the Palos Verdes Peninsula offers," "unique and irreplaceable assets to the City," and "unique physical surroundings which are characteristic of the City." Mun. C., section 1951 speaks of "highly scenic natural historical areas," "rural character of the City," and "open areas." Section 1951(b) speaks of

"view corridors, natural vegetation, land forms and other features."

Nowhere can one find in the VPO a reference to sky, city lights or stars. Nowhere can one find in the VPO a reference to height, mass or style of buildings. These omissions are the very ones which render the VPO so hopelessly vague.

In this case, appellants decided to add an addition to their home to increase both their living space and the value of their property. They hired an architect and had plans drawn completely to code. They were then told that they violated the VPO. This administrative conclusion was based upon an ordinance which provides insufficient criteria to permit a fair and meaningful analysis. In a situation where a homeowner takes the steps appellants took, that homeowner can never know whether he has run afoul of the VPO until he has first been subjected to extensive administrative review by persons charged with understanding the VPO, yet which persons evince the same confusion relative to its meaning and application as the homeowner. Such a situation renders an ordinance such as the VPO void for vagueness. See, *City of West Palm Beach v. Duffey* (Supreme Ct. Fla. 1947) 30 So. 491.

What the VPO truly does is to delegate an absolute legislative discretion to the Commission and the Council. Such delegation is not proper. *Pacesetter Homes, Inc. v. Village of Olympia Fields* (Ct. App. Ill. 1968) 244 N.E. 2d 369, 373. Further, such delegation goes to considerations other than view, namely aesthetics such as size, bulk, style, color and design. These are not view related items.

It has been noted that of all the aesthetic considerations, view impairment is probably the easiest to determine. In "Note-Beyond the eye of the Beholder:

Aesthetics and Objectivity," 71 Mich. L. Rev. 1438, 1452 (1973), the author keys into what the analysis of a view really entails:

> "Maximum height limitations preserve the skyline of a city, as well as provide light and air for the inhabitants. Since these requirements are normally set out in terms of specific measurements, their application should present no subjective difficulties."

The conclusions of that law review author are missing from the VPO. The City has total discretion in concluding what does and does not obstruct a view and can base a finding of view impairment on virtually any complaint received from an affected, disgruntled homeowner. The ascertainable standards to guide those administering an ordinance such as the VPO are not present. The VPO must be held to be unconstitutional. *Wotton v. Bush* (1953) 41 Cal.2d 460, 464, 468.

II

THE REFUSAL TO APPROVE THE PROPOSAL AND GRANT APPELLANTS A BUILDING PERMIT IS A TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW AND WITHOUT JUST COMPENSATION

The courts have held that zoning is the deprivation, for the public good, of certain uses by owners of property to which their property might otherwise be put. *Gilgert v. Stockton Port District* (1936) 7 Cal.2d 384, 391. If the use is so far restricted and the value is depreciated so that it can be said that the regulation goes too far, it will be deemed a taking of the property, in which event the ordinance becomes invalid and unconstitutional, because the taking is without due process of law. *Pennsylvania*

Coal Co. v. Mahon (1922) 260 U.S. 393. See, also, *Bank of America v. Town of Atherton* (1943) 60 Cal.App.2d 268; *Kaiser Aetna v. United States* (1979) 444 U.S. 164; *United States v. Dickinson* (1947) 331 U.S. 745, 750; *United States v. Causby* (1946) 328 U.S. 256.

The United States Supreme Court has noted two theories which could potentially support a claim of "taking" by overregulation. *See, e.g., Williamson County Regional Planning Commission v. Hamilton Bank* (1985) 473 U.S. 172, 105 S.Ct. 3108, 3116-17, disapproved on other grounds, *First English, supra*, at p. 2974. First, a plaintiff may assert that a zoning or other regulation may be so restrictive as to deny him all reasonable beneficial use of his property and, thus, has the same effect as a taking of the property for public use. Under this theory, such a taking would arguably require payment of just compensation under the Fifth Amendment to the United States Constitution.

Alternatively, such a regulation could be viewed as violating the Fourteenth Amendment to the United States Constitution. This theory posits that:

> "regulation that goes so far that it has the same effect as taking by eminent domain is an invalid exercise of the police power, violative of the Due Process Clause of the Fourteenth Amendment. Should the Government wish to accomplish the goals of such regulation, it must proceed through the exercise of its eminent domain power, and, of course, pay just compensation for any property taken."

105 S.Ct. at 3122.

In *Penn Central Transportation Company v. New York City* (1978) 438 U.S. 104, the Supreme Court surveyed some of the general principles governing the "Takings

Clause" of the Fifth Amendment. The court then noted that no "set formula" exists to determine, in all cases, whether public action works a taking. Such is an ad hoc inquiry in which several factors are particularly significant — the economic impact of the activity, the extent to which it interferes with investment-backed expectations, and the character of the governmental action. *Id.* at 124.

Activities other than actual condemnation and physical intrusion can also constitute constructive takings. Such takings occur by governmental regulation through zoning ordinances and other land-use restrictions. While the mere decline in property values does not, alone, constitute a taking requiring compensation, governmental action short of acquisition may constitute a constructive taking "if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter." *United States v. General Motors Corporation* (1945) 323 U.S. 373, 378.

In *First English, supra*, the United States Supreme Court overruled *Agins v. City of Tiburon* (1979) 24 Cal.3d 266. (hereinafter "*Agins*"). *Agins* held that a landowner may not maintain an inverse condemnation suit in state court based upon a "regulatory" taking. *Agins* further held that compensation for a taking would not be required until the challenged ordinance had first been held excessive in an action for declaratory relief or for a writ of mandamus. Prior to *First English, supra*, the *Agins* holding resulted in damages being unavailable in California as a remedy in the situation of a temporary regulatory taking until after the plaintiff had first sought to invalidate the particular regulation. This result, the high court determined, violates the Fifth Amendment to the United States Constitution because the Court held that this

amendment requires compensation as a remedy for temporary regulatory takings.

In our case, appellants have argued that the application of the VPO to them constitutes a taking without just compensation in violation of the Fifth Amendment. [Reply Brief, p. 9] It is clear that the appellate court in our case concurred with *Agins* when it affirmed the trial court's decision. By following *Agins*, the Court of Appeal herein has held that appellants' remedy for a taking without just compensation is limited to nonmonetary relief. Monetary compensation is not available to appellants should they establish an uncompensated taking until they have first exhausted the instant mandamus procedure. As a result of the appellate decision, any arguments by appellants relative to what is or is not a taking and the amount of damages recoverable therefor, must, of necessity, await the final judgment in this action and be pursued independently.

With the decision in *First English, supra*, the issue in this case, in addition to the constitutional challenge to the VPO, is whether or not a taking has occurred for which appellants are entitled to be compensated and what that compensation should be. Since there is no longer a bar to this being raised in this mandamus action, this Court, in addition to finding that the VPO is unconstitutional, should reverse and remand to the trial court so that these issues can be further briefed and ruled upon. Such is appropriate because to preclude appellants in this proceeding from receiving a hearing on the "taking" issue is to create a duplicity and multiplicity of actions which the law frowns upon and strives to avoid.

The regulatory "taking" issue is further ripe in our case because it is the very issue under consideration by the United States Supreme Court in *Nollan v. California*

Coastal Commission, on *certiorari* to United States Supreme Court, Slip No. 86-133. In that case, the high court is being asked to review the case of a property owner who claims his residential property is being taken by the Coastal Commission without just compensation in violation of the Fifth Amendment to the United States Constitution.

In *Nollan,* as a condition of a permit to rebuild their house, the Nollans were required by the California Coastal Commission to dedicate access across the beach area of their property for public use, nearly one-third of their property. The Nollans objected to this requirement on the grounds, *inter alia,* that the exaction of this access dedication would violate the just compensation provision of the Fifth Amendment in that they would be required to bear fully the cost of providing the public the benefit of more public beach.

The Nollans won in their mandamus action at the trial court level but were reversed by the Court of Appeal. The Nollans argued in their Jurisdictional Statement to the United States Supreme Court that the appellate decision would uphold against a constitutional "taking" claim any legislatively authorized exaction of property which is made a condition of an otherwise valid exercise of the State's police power. *Id.* at 12. They went on to argue that the state was acquiring an interest in their land and opening their land to physical invasion for public use. *Id.* at 13.

In our case, there is no physical invasion by the appellants' neighbors or the public. There is, however, an acquisition of an interest of appellants' property by the City with no compensation to appellants. By restricting the development of appellants' property through the application of the VPO, the City is taking appellants' air

space and other property rights. This results in a substantial monetary devaluation of appellants' property. Even more importantly, though, the application of the VPO to appellants results in their property becoming virtually worthless to them. They cannot develop it to meet the needs of their growing family or their own personal needs for increased space.

The taking appellants claim in this action goes beyond and is inconsistent with the construction height restrictions of the City, Mun. C., section 1823(f), which permit a building height of 35 feet and with which section appellants have complied. Appellants should be permitted to present this issue to the trial court.

The evil in the VPO which results in it effecting a taking of appellants' property is the fact that appellants' neighbors through the VPO are able to take appellants' property by precluding appellants from building on their property to increase the size and value of their home. The VPO has, effectively, curtailed virtually all the appellants' desired development on any part of their property. This is a regulatory taking for which appellants should be compensated.

The standards of the VPO create a situation where in our case and in future cases, a taking without just compensation could occur every time the VPO is administered to permit some residents to take the majority of the property of another resident without paying for it. This can occur each time a resident objects to a development of the property on view impairment grounds when such development is otherwise totally in compliance with all City building code requirements. This could be, under the requisite facts, a taking in violation of the Fifth Amendment to the United States Constitution and Article 1, Section 7(a) of the California Constitution. This should

not be the law in Rolling Hills Estates and this Court should correct this violation of appellants' constitutional rights by reversing the appellate court and remanding this case to the trial court for further proceedings consistent with *First English, supra.*

CONCLUSION

For each of the foregoing reasons, the appellate court decision should be reversed. Further, this case should be remanded to the trial court for further briefing and argument as to whether the VPO works a taking of appellants' property for which just compensation is due.

Respectfully submitted,

WEISMAN, BUTLER & WATSON
MARK L. WEISMAN
LAURIE J. BUTLER

By: LAURIE J. BUTLER
Attorneys for Petitioners and Appellants

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On June 24, 1987, I served the within Petition for Review in re: "W. Kenneth Ross vs. The City of Rolling Hills Estates" in the California Supreme Court, State of California, 2nd Civil No. B022314;

On the Parties in said action, by placing One copy thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Hon. Abraham Gorenfeld
111 North Hill Street
Los Angeles, California 90012

Clerk, Court of Appeals
Second Appellate District
3580 Wilshire Blvd., Rm. 301
Los Angeles, California 90010

Richard R. Terzian
Adams Duque & Hazeltine
523 West Sixth Street, 10th Floor
Los Angeles, California 90014

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on June 24, 1987, at Los Angeles, California

CE CE MEDINA

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR
No. B022314
(Super. Ct. No. SWC 83320)

W. KENNETH ROSS, *et al.*,
Plaintiffs and Appellants,

vs.

CITY OF ROLLING HILLS ESTATES, etc., *et al.*,
Defendants and Respondents.

NOT FOR PUBLICATION
IN THE OFFICIAL REPORTS

Filed: May 19, 1987.

APPEAL from a judgment of the Superior Court of Los Angeles County. Abraham Gorenfeld, Temporary Judge.* Affirmed.

Weisman, Butler & Watson, Mark L. Weisman and Laurie J. Butler, for Plaintiffs and Appellants.

Richard R. Terzian, City Attorney, Adams, Duque & Hazeltine and Cristina L. Sierra, for Defendants and Respondents.

Appellants W. Kenneth Ross and Carole A. Ross appeal from a judgment entered in favor of respondents the City of Rolling Hills Estates (the City), the Planning Commission of the City of Rolling Hills Estates (the Commission), and the City Council of the City of Rolling Hills Estates (the Council) denying appellants' petition

*(Pursuant to Cal. Const., art. VI, § 21.)

for writ of mandate. The mandate was sought to compel respondents to approve plans presented by appellants to expand and alter their home, located in the City. The writ also sought to compel the issuance of a variance to zoning ordinances concerning lot requirements. Principally at issue is a view protection ordinance of the City. We reject appellants' contentions that the ordinance is unconstitutionally vague and that the City abused its discretion in denying them a building permit[1] and a variance. Accordingly, we affirm.

Background

On December 21, 1984, appellants filed an application for a variance to permit a two-story addition to their home which would encroach into a code-required 15-foot street-side yard setback and to allow the proposed lot coverage to exceed the code permitted 30 percent limit. The Commission denied the zone variance request on May 20, 1985. No appeal was taken from this decision.

On June 6, 1985, appellants submitted revised plans for the addition to their residence. The revised plans eliminated the zoning violations and the need for any variance. Because the views of other property owners would be impaired to some degree, those owners were notified by the City of their right to file objections and to appear before the Commission. They filed objections to clearance of the revised plans. The Commission conducted a public hearing on August 19, 1985. It found that the proposed addition did not conform to the objectives of the view protection ordinance and denied approval of the plans.

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[1]The City's approval of plans was a precondition to the issuance of a building permit. We refer to the denial of approval of the plans as denial of a building permit, which was its practical effect.

Appellants appealed the Commission's decision to the Council. The Council held a public hearing on October 10, 1985, and affirmed the decision of the Commission.

The View Protection Ordinance

Appellants' challenge to the ordinance asserts that due process is denied them because the ordinance language is unconstitutionally vague. This argument is without merit. Appellants base the argument on semantic challenges to the ordinance's stated purposes and guidelines. The full text of the ordinance is set forth in the margin.[2] Thus, they argue that words such as "needless," "discourage,"

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[2]1950. PURPOSES. The hillsides of the City constitute a limited natural resource in their scenic value to all residents of and visitors to the City and their potential for vista points and view lots. It is found that the public health, safety and welfare require prevention of needless destruction and impairment of views and promotion of the optimum utilization and discouragement of the blockage and misuse of such sites and view lots. The purpose of this ordinance is to promote the health, safety and general welfare of the public through:

"(a) The protection, enhancement, perpetuation and use of sites and view lots that offer views to the residents because of the unique topographical features which the Palos Verdes Peninsula offers, or which provide unique and irreplaceable assets to the City and its neighboring communities or which provide for this and future generations examples of the unique physical surroundings which are characteristic of the City.

"(b) The maintenance of settings which provide the amenity of a view.

"(c) The establishment of a process of design review by which the City may render its assistance toward the objective that views enjoyed by residents of the City will not be significantly obstructed.

"1951. EVALUATION AND REVIEW. To protect the visual quality of highly scenic areas and maintain the rural character of the City, new development should not degrade highly scenic natural

"view," "impariment" and "significantly obstructed," ap-

historical or open areas and shall be visually subordinate to the scenic quality of these areas.

"New development within the various view sheds contained in the City that would have a significant visual impact to those living adjacent to the development, shall be subject to design review. This review shall ensure that development and its cumulative impact is consistent with the previously mentioned standards.

"The design procedures and standards employed in new developments, alterations and additions to existing structures and lots should include appropriate measures that are consistent with appearance and design goals of the View Protection Ordinance. Development proposals should be coordinated in order to:

"(a) Maximize open space preservation.

"(b) Protect view corridors, natural vegetation, land forms, and other features.

"(c) Minimize the appearance of visually intrusive structures.

"(d) Prevent the obstruction of property owners' views by requiring appropriate construction of new structures or additions to existing buildings or adjacent parcels.

"(e) Assess the potential view loss from public areas of any proposed major structures as well as alterations and additions to existing structures.

"(f) Determine whether other suitable design options are available to the property owner in order that view obstructions may be eliminated or lessened in severity.

"1952. CLEARANCE PROCEDURES. Should it appear that a potential view impairment may result from a proposed development, addition or alteration, the site shall be subjected to a View Preservation Site inspection. A fee shall be charged for such inspection as the City Council shall fix by resolution.

"1953. INSPECTION. Upon such inspection, should the City zone clearance official determine that the proposed development addition or alteration will impair a view site, the matter shall be referred for

pearing in various portions of the text, do not provide sufficient guidance and are "unintelligible concepts."

The tests which apply when a statute or ordinance is challenged for vagueness are set forth in *Hand* v. *Board of Examiners* (1977) 66 Cal.App.3d 605, 620-621: "In *McMurtry* v. *State Board of Medical Examiners* (1960) 180 Cal.App.2d 760, 766-767 [4 Cal.Rptr. 910], the court stated various tests for vagueness: 'It is well settled that

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hearing and review by the Planning Commission pursuant to Sections 1954 and 1955 below.

"1954. ADMINISTRATION AND REVIEW. It shall be the duty of the Planning Commission to administer the provisions of the View Protection Ordinance. Review of any site for such purposes shall be initiated by the City pursuant to a View Preservation Site Inspection or otherwise, or by any person aggrieved.

"1955. POWERS AND DUTIES OF PLANNING COMMISSION. The Planning Commission shall hold a public meeting when complaint opposed to any pending development addition or alteration has been filed by a person aggrieved or referred by the City zone clearance official. In connection with the foregoing, the Planning Commission:

"(a) Shall hear and review such complaints or referrals regarding the proposed construction, alteration or additions.

"(b) May request, following a public meeting, that proposed action on a particular site or plans to make any additions to existing structures or new accessory structures on the lot in question will meet the mitigation measures of the View Protection Ordinance as outlined by the Planning Commission.

"(c) Coordinate and conciliate to the maximum extent possible the resolution of disputes among property owners concerning view obstructions.

"1956. APPEAL. Any person aggrieved may appeal the Planning Commission decision to the City Council within twenty (20) days after determination of required view protection mitigation measures."

"a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." [Citations.] This principle applies not only to statutes of a penal nature but also to those prescribing a standard of conduct which is the subject of administrative regulation. [Citations.] *The language used in such legislation "must be definite enough to provide a standard of conduct" for those whose activities are prescribed as well as a standard by which the agencies called upon to apply it can ascertain compliance therewith.* [Citation.] Approved rules by which to judge the sufficiency of a statute in the premises have been applied in numerous decisions, i.e., the words used in the statute should be "well enough known to enable those persons within its purview to understand and correctly apply them." [Citation]; words of long usage, or which have an established or ascertainable meaning in the profession or industry involved, or those which have been given a definite and restrictive interpretation by the courts, or the meaning of which may be determined from a fund of human knowledge and experience, will meet the test of certainty. [Citations]; if the words used may be made reasonably certain by reference to the common law, to the legislative history of the statute involved, or to the purpose of that statute, the legislation will be sustained [citations]; and a standard fixed by language which is reasonably certain, judged by the foregoing rules, meets the test of due process "notwithstanding an element of degree in the definition as to which estimates might differ. [Citations.]" (Italics added.)"

Applying these tests we do not find the ordinance to be too vague. A reasonably certain standard in light of the need for view protection can be determined. Indeed, we

find it ironic that appellants, arguing in their reply brief that their house is located in a highly built-up residential area and not an untouched scenic wilderness, choose to argue that this case involves only "a normal residential addition in an area where there is a scenic view already *significantly obstructed*. . . ." (Emphasis added.) That very underlined phrase, readily understood, is one they themselves challenge as too vague to be enforced.

While not itself a zoning ordinance, the view protection ordinance is closely related. "[A] substantial amount of vagueness is permitted in California zoning ordinances" in order to permit delegation of broad discretionary power to administrative bodies. (*Novi* v. *City of Pacifica* (1985) 169 Cal.App.3d 678, 682; and see *Piano* v. *State of California ex rel. New Motor Vehicle Bd.* (1980) 103 Cal.App.3d 412, 418.) The ordinance at issue passes muster.

Denial of Building Permit

Appellants' contention that respondents abused their discretion in denying appellants a building permit is based on three grounds: (1) that the Council based its decision on zoning criteria involving aesthetics which had not yet been adopted, rather than on the criteria established by the view protection ordinance; (2) that it failed to make findings sufficient to its decision; and (3) that its findings are not supported by the evidence.

The record here does not reflect that the City relied on criteria contained in future zoning regulations to deny appellants' proposal. The need to protect the rural character of the area, which is a stated goal of the view protection ordinance, was considered by the council members. While the mayor stated that he hoped that future residential zoning would address aesthetics, he also said

that he was not relying on aesthetics in voting to affirm.[3] This case is thus distinguishable from *Gabric* v. *City of Rancho Palos Verdes* (1977) 73 Cal.App.3d 183.

By affirming the Commission's decision, the Council in effect adopted its findings. (*Carmel Valley View, Ltd.* v. *Board of Supervisors* (1976) 58 Cal.App.3d 817, 823.) The testimony taken at the Council's public hearing was substantially the same as the evidence before the Commission, and merely reinforced the Commission's decision.

The Commission found that the proposal would have an adverse impact on existing views and that appellants had failed to provide design alterations to minimize the view impact of their propoosal.[4] Those findings are sufficient to apprise the parties and the court of the basis for the City Council's action. (*Topanga Assn. For a Scenic Community* v. *County of Los Angeles* (1974) 11 Cal.3d 506, 514.)

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[3]The mayor stated: "[W]e hope that when we do our residential zoning . . . we get in the[re] some statement . . . [that] any new homes or any . . . additions to existing structures should be in keeping with existing structures. . . . And while I don't want to get involved with the aesthetics at the moment, I certainly can't believe that this is in keeping with the size."

[4]The minutes of the Commission state: "After further discussion, it was the consensus of the COMMISSION *that the ridgeline height of the addition and the impact on existing views was of major concern.* COMMISSIONER GIULIANO stated that both sides of this issue should compromise and try to solve the problems at hand. COMMISSIONER SERVIS added that Mr. Ross' failure to provide design alterations to this proposal does not meet with the objective of the view preservation ordinance. There being no further testimony, COMMISSIONER SERVIS moved, seconded by COMMISSIONER RUTKOSKY THAT COMMISSION FOUND THE PROPOSED TWO STORY ADDITION AT 4667 ROLLANDO DRIVE DOES NOT CONFORM TO THE OBJECTIVES OR THE VIEW PROTECTION ORDINANCE AND BE DENIED." (Emphasis added.)

The trial court apparently determined, as we have done, that the Council in effect adopted the Commission's findings regarding impact on existing views and failure to mitigate that impact.

Appellants' contention that the findings are not supported by the evidence also lacks merit. In reviewing the administrative decision, the trial court properly applied the substantial evidence standard, resolving all reasonable doubts in favor of the administrative decision. (Code Civ. Proc., § 1094.5, subd. (c); *Topanga Assn. For a Scenic Community* v. *County of Los Angeles*, *supra*, 11 Cal.3d at p. 514.) The appellate court reviews the evidence by the same standard appropriate in the trial court. (*Schmitt* v. *City of Rialto* (1985) 164 Cal.App.3d 494, 501.)

The record discloses that the Council had before it appellants' proposal, a staff recommendation that mitigating factors be incorporated into the design from the City's planning director, graphs and photographs indicating the view of city lights from the impacted properties and the extent that the proposal would affect the view, and the testimony of Stan Crawford and Margaret Larson, who testified that their views from their residences would be affected by the proposed addition. That evidence supports findings of significant view impairment and of failure to mitigate the impact on existing views.

Denial of Variance

We do not consider the merits of appellants' contention that the City abused its discretion in denying them a variance, because the issue is not properly preserved. It will be recalled that the Commission initially denied appellants' request for a variance. That denial was appealable to the Council under section 1898, subdivision (i) (1)

of the City's Municipal Code.[5] No such appeal was taken. Therefore, appellants failed to exhaust their administrative remedies. (*Pan Pacific Properties, Inc.* v. *County of Santa Cruz* (1978) 81 Cal.App.3d 244, 249; *Roth* v. *City of Los Angeles* (1975) 53 Cal.App.3d 679, 686, 687.) When the matter from which an appeal *was* taken was before the Commission later no question of a variance was involved at all.

Since the variance ordinance (see fn. 5 *supra*) allows the Council to "cause any decision of the Planning Commission to be appealed" and since the ordinance also provides in the first sentence of section 1898 that the Council may under certain circumstances initiate proceedings for consideration of the granting of a variance, appellants naturally argue that one or the other of these provisions should be invoked to save this appeal. The fact is, however, that the Council did not cause the Commissions' decision to be appealed, nor did it initiate proceedings for the grant of a variance. The transcript of the proceedings before the Council has some language in it concerning appellants' swimming pool and deck, which were involved in the variance question. Toward the end of the hearing a Council member stated that view preservation was an important cornerstone "of our philosophy all along and that's why and therefore I move we deny it

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[5]Section 1898, subdivision (i)(1) provides: "The decision of the Planning Commission shall be final unless an appeal thereform is taken to the Council, as provided for in this paragraph. Such decision shall not become effective for twenty (20) days from the date that the written decision has been made and notice thereof mailed to the applicant by registered mail, during which time written appeal thereform may be taken to the City Council by the applicant or any other person aggrieved by such decision. The City Council may, upon its own motion, cause any decision of the Planning Commission to be appealed."

until such time as an amicable arrangement be agreed upon by the neighbors and the owner." The three other councilmen, including the mayor further discussed the matter, including both the swimming pool and the view, and then the original councilman said "I would like to move that we uphold the Planning Commission's denial of the variance." In the context of the entire meeting and of the administrative record, it is clear that he merely misspoke himself. There had been no appealed denial of the variance request. What really occurred is reflected in the Council's minutes which reflect that the Council upheld the Commission's denial regarding the proposed two-story addition to appellants' house. No issue of a variance is properly before us.

Disposition

The judgment is affirmed. Respondents to recover their costs on appeal.

COLE, J.*

We concur:

KINGSLEY, Acting P.J.

McCLOSKY, J.

B022314
Butler & Watson Weisman
9777 Wilshire Blvd.
Suite 500
Beverly Hills, CA 90212

---

*Assigned by the Chairperson of the Judicial Court.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On June 24, 1987, I served the within Petition for Review in re: "W. Kenneth Ross vs. The City of Rolling Hills Estates" in the California Supreme Court, State of California, 2nd Civil No. B022314;

On the Parties in said action, by placing One copy thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Hon. Abraham Gorenfeld
111 North Hill Street
Los Angeles, California 90012

Clerk, Court of Appeals
Second Appellate District
3580 Wilshire Blvd., Rm. 301
Los Angeles, California 90010

Richard R. Terzian
Adams Duque & Hazeltine
523 West Sixth Street, 10th Floor
Los Angeles, California 90014

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on June 24, 1987, at Los Angeles, California

CE CE MEDINA

APPENDIX H

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 4, No. B022314

S001344

Filed July 29, 1987

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

ROSS, *et al.*

vs.

CITY OF ROLLING HILLS ESTATES, *etc. et al.*

Appellants' petition for review DENIED.

PANELLI

Acting Chief Justice

APPENDIX I

IN THE COURT OF APPEAL
OF THE
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT,
DIVISION FOUR

2 Civ. No. B022314

W. KENNETH ROSS, and
CAROLE A. ROSS,
Appellants,

vs.

THE CITY OF ROLLING HILLS ESTATES, *etc., et al.,*
Appellees.

Received for filing September 16, 1987

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that W. Kenneth Ross and Carole A. Ross, the appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Court of Appeal of the State of California, Second Appellate District, Division Four, entered in this action in favor of appellees on May 19, 1987, petition for review denied by the Supreme Court of the State of California on July 29, 1987. This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

Respectfully submitted,

WEISMAN, BUTLER & WATSON

By: /s/ Laurie J. Butler
Laurie J. Butler
Attorneys for Appellants

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 9777 Wilshire Boulevard, Suite 600, Beverly Hills, CA 90212.

On September 16, 1987, I served the within Notice of Appeal in re: "W. Kenneth Ross vs. The City of Rolling Hills Estates" in the California Supreme Court, State of California, 2nd Civil No. B022314;

On the Parties in said action, by placing One copy thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Beverly Hills, California, addressed as follows:

Honorable Abraham Gorenfeld
111 North Hill Street
Los Angeles, California 90012

Richard R. Terzian
Adams Duque & Hazeltine
523 West Sixth Street, 10th Floor
Los Angeles, California 90014

California Supreme Court
3580 Wilshire Boulevard, Room 213
Los Angeles, California 90010

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on June 1, 1987, at Los Angeles, California.

Gerri Gruber

APPENDIX J

VIEW PROTECTION

1950. PURPOSES. The hillsides of the City constitute a limited natural resource in their scenic value to all residents of and visitors to the City and their potential for vista points and view lots. It is found that the public health, safety and welfare require prevention of needless destruction and impairment of views and promotion of the optimum utilization and discouragement of the blockage and misuse of such sites and view lots. The purpose of this ordinance is to promote the health, safety and general welfare of the public through:

(a) The protection, enhancement, perpetuation and use of sites and view lots that offer views to the residents because of the unique topographical features which the Palos Verdes Peninsula offers, or which provide unique and irreplaceable assets to the City and its neighboring communities or which provide for this and future generations examples of the unique physical surroundings which are characteristic of the City.

(b) The maintenance of settings which provide the amenity of a view.

(c) The establishment of a process of design review by which the City may render its assistance toward the objective that views enjoyed by residents of the City will not be significantly obstructed.

1951. EVALUATION AND REVIEW. To protect the visual quality of highly scenic areas and maintain the rural character of the City, new development should not degrade highly scenic natural, historical or open areas and shall be visually subordinate to the scenic quality of these areas.

New development within the various view sheds contained in the City that would have a significant visual impact to those living adjacent to the development, shall be subject to design review. This review shall ensure that development and its cumulative impact is consistent with the previously mentioned standards.

The design procedures and standards employed in new developments, alterations and additions to existing structures and lots should include appropriate measures that are consistent with appearance and design goals of the View Protection Ordinance. Development proposals should be coordinated in order to:

(a) Maximize open space preservation.

(b) Protect view corridors, natural vegetation, land forms, and other features.

(c) Minimize the appearance of visually intrusive structures.

(d) Prevent the obstruction of property owners' views by requiring appropriate construction of new structures or additions to existing buildings or adjacent parcels.

(e) Assess the potential view loss from public areas of any proposed major structures as well as alterations and additions to existing structures.

(f) Determine whether other suitable design options are available to the property owner in order that view obstructions may be eliminated or lessened in severity.

1952. CLEARANCE PROCEDURES. Should it appear that a potential view impairment may result from a proposed development, addition or alteration, the site shall be subjected to a View Presentation Site inspection. A fee shall be charged for such inspection as the City Council shall fix by resolution.

1953. INSPECTION. Upon such inspection, should the City zone clearance official determine that the proposed development addition or alteration will impair a view site, the matter shall be referred for hearing and review by the Planning Commission pursuant to Sections 1954 and 1955 below.

1954. ADMINISTRATION AND REVIEW. It shall be the duty of the Planning Commission to administer the provisions of the View Protection Ordinance. Review of any site for such purposes shall be initiated by the City pursuant to a View Preservation Site Inspection or otherwise, or by any person aggrieved.

1955. POWERS AND DUTIES OF PLANNING COMMISSION. The Planning Commission shall hold a public meeting when complaint opposed to any pending development addition or alteration has been filed by a person aggrieved or referred by the City zone clearance official. In connection with the foregoing, the Planning Commission:

(a) Shall hear and review such complaints or referrals regarding the proposed construction, alteration, or additions.

(b) May request, following a public meeting, that proposed action on a particular site or plans to make any additions to existing structures or new accessory structures on the lot in question will meet the mitigation measures of the View Protection Ordinance as outlined by the Planning Commission.

(c) Coordinate and conciliate to the maximum extent possible the resolution of disputes among property owners concerning view obstructions.

1956. APPEAL. Any person aggrieved may appeal the Planning Commission decision to the City Council within twenty (20) days after determination of required view protection mitigation measures.

APPENDIX K

COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

W. KENNETH ROSS and CAROLE A. ROSS,
Petitioners-Appellant,

vs.

THE CITY OF ROLLING HILLS ESTATES,
AN INCORPORATED CITY,
THE PLANNING COMMISSION OF THE CITY OF ROLLING HILLS ESTATES,
AND THE CITY COUNCIL OF THE CITY OF ROLLING HILLS ESTATES,
Respondents-Appellee.

SUPERIOR COURT NO. SWC 83320

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY
HONORABLE ABRAHAM GORENFELD, JUDGE PRO TEMPORE

REPORTER'S TRANSCRIPT ON APPEAL

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Torrance, California;
Tuesday, April 1, 1986; 9:25 A.M.
Department Southwest J
Hon. A. Gorenfeld, Judge Pro Tem.

* * *

The Court: Ross vs. City of Rolling Hills.

Mr. Terzian: Good morning, your Honor. Richard Terzian and Christina Sierra for the respondent, The City of Rolling Hills Estates.

Ms. Butler: Good morning, your Honor. Laurie Butler of Weisman, Butler & Watson on behalf of the petitioners, Kenneth and Carole Ross, who are present in court and seated to my right.

The Court: All right; this is a Petition For A Writ Of Mandate. I have opposition filed by the City of Rolling Hills Estates, claiming you have not exhausted your administrative remedies, and claiming substantial evidence supports the city council's findings; that the city's decision is supported by the findings, and that the view protection ordinance is constitutional.

Now, you tell me where they are wrong about all of those things.

Ms. Butler: I would be happy to do that.

Initially, we want to do this in chronological order. With respect to exhausting the administrative remedy, the matter of the swimming pool, the retention of the swimming pool and decking, whether or not petitioners would be willing to retain it, first came up in May with one of the prior submissions.

There were four sets of plans, your Honor, and the third set of plans involved the situation, where because of the proposed addition of excess lot coverage, and, there-

for, the Rosses at that time, in order to avoid a problem with the excess lot coverage, agreed to remove the pool and decking.

Subsequently a Planning Commission meeting was held in May 1985, and the Planning Commission, against the staff's recommendation to approve that third set of plans, voted to not grant the variance.

Thereafter, the Rosses did not appeal that variance, because they had had a new set of plans created which became the subject of this action.

These plans were submitted to the staff in June of 1985, and the result of the June submission did not involve the necessity to have a variance ruled upon.

The Planning Commission denied the fourth set of plans, and did not give them a permit to build. Thereafter, they appealed this to the City Council, which heard the matter on October 10, 1985.

Now, it is at the City Council Meeting on October 10, 1985, where Mr. Ross brought up the matter of his desire to retain the swimming pool and decking, based upon a belief that this was something which was considered a community asset.

He had been told this by the staff directors, Emslie and Nystrom. His children use the pool. He had complied with the lot coverage requirement with respect to the fourth edition.

At the beginning of the Council Meeting when he made his statement — and you have a copy of that, your honor, in the Exhibits to the Petition, which is the transcript of the hearing.

At that time, he made a request to the Council that he wanted to retain his pool and his decking.

During the course of the Council Meeting, Councilman Schwarzman and Councilwoman Mirels, at page 14 of that transcript, made various statements evidencing their belief that Mr. Ross really should not have to remove his pool, and I quote from page 38 of our Petition — Points and Authorities, wherein councilwoman Mirels states at line 16, "nobody sees that," referring to the pool, "why shouldn't he have the use of it."

Then Councilman Schwarzman later down says, "we don't particularly like the idea of a structure on a piece of property that is so large as to overwhelm that property, and so whether someone takes the swimming pool out of the back yard to do something else, well, it is not exactly the intent."

Municipal code section 1898 permitted the City Council upon its own motion to consider an application for a variance.

The motion at the end of the Council Meeting by Councilman Muller to deny the variance is indicative of the fact that, at that City Council Meeting on October 10, 1985, the City Council did on its own motion consider Mr. and Mrs. Ross's request to retain their pool and decking and ruled upon it.

Now, the opposition says that it was a slip of the tongue. "He didn't mean it. It was by accident that the word 'variance' came out. What he really meant to say was view protection ordinance."

I submit, your honor, —

The Court: It was a slip of whose tongue?

Ms. Butler: Mr. Muller, Councilman Muller. That is what is in their papers.

Now, Mr. Terzian was present at that meeting as the City Attorney for the City of Rolling Hills Estates, and it

strikes me a bit odd that no one at that time corrected the slip of the tongue, given the fact that this would have some impact upon later actions taken by the city with respect to Mr. and Mrs. Ross.

However, be that as it may, it is our position that there were more than adequate grounds, which had been supplied to the City Council from the staff reports, and from the entire record, which have been presented to the court today, justifying the fact that, number one, it was a substandard lot — fourteen thousand — and the minimum lot size now is twenty thousand in Rolling Hills Estates.

There are limited building options. There is a sewage underneath the decking. You couldn't build that way. So even if he removed the decking and tried to do something else, you've got that problem.

You couldn't build in the area except in the way that they were doing it, because — that they have proposed because of the drainage and excavation problems; and, therefore, one of the tests that is authorized under section 1898 is, is this a hardship.

This is a case where people should be given a leeway. After all, it is hot in the summer, and no person has ever in the history of Rolling Hills Estates been required to remove their swimming pool and decking to comply with the lot coverage requirement.

So, your Honor — and this had been stated at one of the previous commission meetings; I think the one in May of 1985.

One of the Commission members was astounded that Mr. and Mrs. Ross would have been willing to remove their pool to gain the necessary living space for their growing family.

So, I submit, your Honor, there were sufficient grounds available to the City Council by virtue of the staff reports, by their own conduct, and by Mr. Muller's statement at the end of the meeting that on their own motion they considered it, and they denied it, giving us grounds before you today, your Honor, to seek a Petition For A Writ Of Mandate, trying to remedy that wrong.

That is the first response to one of the matters of opposition. Now, may I go on?

The Court: Sure.

Ms. Butler: Because of the situation of substantial evidence — that is the bulk of our matter — I would like to address the other matters first, which are less lengthy in my response.

The matter of the remedy sought herein by the petitioners being inappropriate, the city cites a set of cases which appear to lead the court to believe that, all you can do this morning, your Honor, is to remand it for further consideration in light of your findings today. That is not the state of the law, your Honor.

The state of the law specifically provides in two California cases, and I will cite them to your Honor. One is entitled Tripp vs. Swoap. It is a 1976 California Supreme Court Case, wherein the court was specifically empowered to grant the relief, because there was nothing left to do except make a particular determination.

The Court: Have you cited that somewhere in your points and authorities?

Ms. Butler: No, your Honor, because this came up in response to their papers.

The Court: Do you have the citation then?

Ms. Butler: 17 Cal.3D 671. I have a copy of the case with me here this morning. I would be happy to provide it to you.

The Court: Oh, we have a complete library in the back room.

Ms. Butler: Okay. The second case wherein essentially the same result was reached in the case of Ross General Hospital — no relation to the Petitioners — vs. Lackner. That is a 1978 case. 83 Cal.App.3d 346.

Again, in that case, when there is a particular determination as a matter of law, which the records of the administrative proceedings require, then the trial court may order the agency to carry out its legal obligation without further administrative proceedings, giving ground for the fact that you do not have to just remand it.

You can rule today on the variance, and on the fact that the view protection ordinance was not violated such as to deny the Rosses' building permit.

Now, getting back to the other areas of the opposition, which is probably the meat of the case, being the substantial evidence to support the findings, whether or not they proceeded in a manner required by law, and whether the decision is supported by the findings; and then, secondly, of course, the constitutionality of the view protection ordinance, I would like to address the constitutionality argument first.

The city has in their papers essentially stated that — now, we are referring, your Honor, to sections 1950 through 1955 of the Municipal Code. These are Exhibit A to our Petition For Writ Of Mandate.

Essentially this is a statutory ordinance structured whereby supposedly the protection of the view of the

residents of Rolling Hills Estates is sought to be regulated. It is entitled view protection ordinance.

Our problem with that ordinance is that it purports to do far more than what it says it does. We feel that this, you know, based upon an analysis of the language constitutes a vague, overboard, and unconstitutional exercise of a municipality's powers in creating an ordinance which no one can understand.

For example, the staff in interpreting the view protection ordinance — and incidentally, in the first three submissions of plans that the Rosses made, the view protection ordinance never came up.

It was only at the last submission, the one in June, where the Rosses increased the height of their proposed addition, in order to avoid being required to seek a variance because of the lot coverage situation. It was only then that the view protection ordinance came up.

When it came up, the staff contacted the affected residents. The staff made a determination as it was required to do under this statutory structure, that there were two affected residents; two people whose views would be impacted to some degree by the construction of the proposed addition.

These were Mr. and Mrs. Crawford and Ms. Larson. The staff went out and made an inspection of this view from the property of these people.

Now, Mr. and Mrs. Crawford filed objections. They sent letters to the council, and they appeared at the council meeting and the commission meeting to oppose the addition on the gound of the view.

However, they did not really oppose it on the ground of view as much as they opposed it on the ground that they didn't like the looks of it; that it was too bulky. It was not

in keeping with what they stated to be a one story split level neighborhood.

However, the staff said in its report, which we have attached as an exhibit, and which I quote in my papers at some length, found that there was no view impact.

Now, without getting into whether or not we violated the view protection ordinance or not — that really goes to the substantial evidence to support the City's action — you have on one hand the staff composed of architects, experts, people whose duty it is to figure out whether or not something is going to block a view.

They said the only thing that you are supposed to look at with the view protection ordinance is view; not streetscape, not esthetics, not whether or not something is bulky, or overbuilt; just the view.

Now, in the City's papers when they are talking about the fact that the ordinance is constitutional, they quote a case which says, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process."

Then they go on again to say that, if people can not ascertain what the standards are, then it is unconstitutional.

Your Honor, I submit that we have the staff saying that it means one thing; the homeowners and the Commission saying that it means another thing. If that is not a reasonable difference of men as to the interpretation of an ordinance, then I don't know what is; and it is based upon this.

The fact that this ordinance talks about making a finding that there is a significant obstruction of view. That is the language it uses.

Yet, what it is interpreted to do, and what they use it for is to stop people from building houses that they don't like the looks of; not view. Something else.

Your Honor, we had prepared, and I offered one of these to counsel, an enlarged picture of the various houses in the area, as well as the view itself, which are better than the copies of the pictures you have in front of you, your Honor.

I would ask the court to take a look at this because I would like to refer to this, if the court would. They have no objection.

The Court: Any objection?

Mr. Terzian: Your Honor, my understanding is that these are the original pictures of the photocopies that are attached to the petition.

The Court: All right. Will you give them to the bailiff, please.

Ms. Butler: Yes, your Honor.

The Court: While you are doing that, let's get these people married. They have no interest in this problem. (Brief recess.)

The Court: All right; Mr. Terzian.

Ms. Butler: Oh, I have a few more things to add, your Honor.

Does your Honor have in front of you the black notebook?

The Court: Yes, I do.

Ms. Butler: All right; this has in it Exhibits G through GG. What these are, are photographs G, H. and I. They are photographs of view from the Crawford house, which photographs were taken by Mr. Ross prior to the August 19 planning commission meeting to be able to respond to the concerns raised by the city view protection.

I just want to point out to the court that all of the markings on the picture were made by the staff.

The view corridor which is in issue in Exhibit G is the sole portion of the view, which is affected, and there were some statements made in their papers as to where we came up with an eight per cent view obstruction.

It is my understanding that this was based upon an examination of these photographs.

Now, Exhibit H is the larger view, and Exhibit I is a larger view of what the view is.

The Court: When we talk about a view obstruction, are we concerned about whether there is a view of the sky, or the ocean, or —

Ms. Butler: It is my understanding that —

The Court: — a 360 degree view, or 180, 90; what?

Ms. Butler: In the record, the objections raised by Ms. Larson and Mr. Crawford were the fact that their city lights view was going to be obstructed. So what we are talking about is the city lights and view of the ocean. Those were the things that were supposedly talked about with respect to the view.

The view protection ordinance, however, does not give you specific parameters. All it says is, if there is a determination that there is a significant obstruction of view, then certain mitigating factors have to be considered.

The Court: Well, that is rather abstract; isn't it? Shouldn't we define what we are concerned about; whether we are talking about view, or are we talking about city lights, or the ocean, or the trees, or what?

Ms. Butler: Well —

The Court: Maybe the city can tell us what we are looking for.

Ms. Butler: — Do you want me to let them respond to your Honor, or go on?

The Court: No; go ahead with your argument.

Ms. Butler: I was reading the daily journal last night, and I ran across a case which appeared there, which talks about view — which talks about obstruction of view.

It is entitled Pacific Homeowners Association vs. Wesley Palms Retirement Community. It appeared in the March 31 daily appellate report at page 966.

What it was, your Honor, is a case where some homeowners sued a retirement community because the trees, which had been approved in connection with the height of the building, grew too tall, higher than the building and blocked their view. The Court talks about —

The Court: View of what?

Ms. Butler: Their view of the basin, the Los Angeles basin. Well, actually, not the Los Angeles basin; Mission Bay in the City of —

The Court: We have some trees that have grown up and blocked our view of a very ugly building. We are very happy that we don't have to look at it anymore; so, you know, you can't talk about view in the abstract.

Ms. Butler: Well, what we are talking about — what they are talking about in this case is — and the only reason I bring it up, your Honor, is to assist us in definition.

What they say is — this is at page 966 — local governments may also protect views which provide for light and air through the adoption of height limits.

It seems to me that when you are talking about view — counsel, you are welcome to take a look at it — when you are talking about view, you are talking about height.

In our papers we make reference to this; that height is not that difficult of a concept to regulate or to deal with, or to define or to set up a regulatory structure for.

What the view protection ordinance purports to do is to set up a system whereby if someone doesn't like what you are going to build and can tie this to view, then they can stop you from building anything, which they find to be visually intrusive, whatever that means.

My problem with the ordinance is not with the intent. We will recognize, and we do recognize that the State of California and various municipal agencies have the right to regulate matters, which pertain to the general welfare of their citizens, that promote the maintenance of nice neighborhoods.

When my clients were voted with defeat, they didn't walk out of Rolling Hills Estates when they couldn't get their building built. They have proceeded to try to and go through the system, and get what they want that way. They are not interested in creating a problem.

All they want is to be treated fairly. This ordinance does not afford them that right.

We submit, your Honor, that if the staff, which is supposed to make the view inspection pursuant to the

ordinance, interprets it one way — you can see that from the report.

They say you can't consider anything but the view, and the Commission and the homeowners and the City Council say it means something else, and so we've got a problem.

The Court: Wouldn't there be a lot of trouble if we adopted that concept. What would we do with a five-to-four decision by the Supreme Court? Does that make the law unconstitutional, because five say it means one thing, and four say it means the other thing; or if you have a five-to-two decision in the State Supreme Court?

Ms. Butler: Well, your Honor, no. It doesn't make it unconstitutional; but in this case when you purport to deprive a property owner of his property rights, even under the auspices of the general welfare clause in police power it seems to me that you have got to make the ordinance capable of enforcement with standards which can be dealt with and applied by the body charged with applying them in an even handed and, you know, reasonable manner.

I don't see how you can do that from this ordinance. I will not read the ordinance. Your Honor has obviously read it and is familiar with it, but it sets forth various criteria, which are extremely vague.

It, to me, you know, renders an injustice to people who are trying to comply with a height limitation to avoid a view problem, and are hit with something totally different by virtue of the ordinance, which is only supposed to regulate view.

Now —

The Court: Well, I have only one request. You know, we have a limited amount of time for the argument of this matter. I assume that the important parts of your argu-

ment are included in your points and authorities — is that right — which I intend to read thoroughly, and all of the cases that are referred to there; so in the course of argument I think you should limit yourself only to new matters that may be generated by the discussions.

Ms. Butler: Very well, your Honor. The last matter that I want to deal with is, of course, the sufficiency of the evidence; whether or not there was substantial evidence to justify the acts taken by the commission at the August 19 meeting, and the City Council at the October 10 meeting.

The Court: Will you concentrate then on answering the arguments that are made by the city with respect to the sufficiency of the evidence.

Ms. Butler: Yes, I will do that.

The Court: Because I have read your points and authorities up to this point.

Ms. Butler: Essentially what the city says is that in reviewing the actions taken by the municipality under the substantial evidence rule you have to give the city the benefit of the doubt.

What we are saying is that, even giving the city the benefit of the doubt, the evidence in support of permitting the Rosses to gain approval of a building permit for their proposed addition and retaining the swimming pool —

The Court: Do you agree that I am bound by the substantial evidence rule?

Ms. Bulter: Yes, I do, your Honor. We do not dispute the substantial evidence rule.

The Court: All right.

Ms. Butler: I do dispute their characterization, however, in their brief that substantial means reasonable; that

if there is any reasonable basis, then you have to favor the city over the petitioner. I do not think that is correct.

I don't think it is supported by cases, and there are cases which have found, under the substantial evidence rule, that, you know, cities or municipalities, or agencies, are wrong and completely reversed and granted variance requests of the petitioner's building permit.

One matter though, which under the substantial evidence test, which was brought up by the other side, is that based upon the fact that we are limited to the record, which we have acknowledged, as to what can be looked at in determining whether or not there was a prejudicial abuse of discretion, they say that there is no authority for the court to make an independent viewing of the disputed view.

We have Seligman vs. Tucker in our papers to refute that, and the basis for my statement that the court has the ability to also take a look at the view and see if there is a significant obstruction is the fact that the staff already made an inspection.

The City Council members live in this area, and know the particular streets involved; but most importantly the staff met with everybody and made the viewing itself; and, therefore, in making their report and providing their records to the Council for the purpose of the City Council hearing in October, the Council was charged with the knowledge of having the view information of the staff.

It is on that basis that we would urge the court to, before you make a decision, give us the benefit of the doubt and let us — you know, take a look yourself and see if what they saw is a significant view obstruction.

That deals with that one issue in that part of their opposition, which says that you can not look at the view.

The Court: All right. Should that become advisable, do I have a stipulation that I can go out there and take a look myself without convening court there, and bring the reporter, the bailiff, and the clerk, and everybody else that goes with a court session?

Ms. Butler: I would stipulate.

Mr. Terzian: Your Honor, that is not within the administrative record. This court is bound by the administrative record in the determination that was made by the council at the administrative hearing.

That would be tantamount to going out and starting to take more evidence on a substantial evidence case, and I do not think that is permitted by statute.

The Court: Well, I would disagree. I suppose it might be helpful to the court to see if I could see the same thing that somebody else saw, whether it is the staff or the city council or anybody else connected with this problem.

Mr. Terzian: Your Honor, that would mean that this court was re-weighing evidence, re-assessing the credibility of the witnesses, and taking new evidence; all of the things that the court is not supposed to do in an administrative mandamus proceeding.

The court looks at the record, and see if there was substantial evidence. Simply because the court might have taken a different view of the same evidence does not permit the court to substitute its own determination. That is what an administrative mandamus proceeding is all about.

In effect, this court sits as the equivalent of an appellate court, reviewing what a trial court has done, and the court is limited to determining whether or not there was substantial evidence to support the findings of the deter-

mination that was made by an administrative agency below.

If such substantial evidence appears, that is the end of the situation. That is the end of the case.

The Court: Suppose at that administrative hearing some member of the staff or city council said, "I took a look at it, and I could see Catalina Island," and I go out there, and I can't see Catalina Island.

Am I entitled to take that into account? Would there be substantial evidence then?

Mr. Terzian: With all due respect, that would be a part of the evidence that the court would consider; the fact that one council member said something; the fact that a council member had gone out there and taken a personal view of the property. As a matter of fact, cases permit that.

A council member can go out and take a look at the property as long as he announces that fact. As long as he or she announces that fact, that can be taken into account.

That would be part of the substantial evidence in the record before this court on review. But if the court goes out there and takes a look at the same thing or attempts to take a look at the same thing itself, that means the court is substituting itself for the administrative agency below.

That is what 1094.5 says that you can not do on a substantial evidence case. There is a good reason for that, of course, your Honor.

The Court: But the court does have the authority to determine that there is not substantial evidence supporting the findings; wouldn't it.

Mr. Terzian: That is correct.

The Court: Wouldn't a viewing by the court help the court to determine, was there substantial evidence?

Mr. Terzian: The court has the right to determine whether or not there was substantial evidence based upon the administrative record before the court, and the court does have the administrative record before the court.

The Court: Oh, I will not take a look until somebody gives me some authority, indicating that I have the right to do that.

Ms. Butler: Well, your Honor, I would like to give you some authority. The statute which we are dealing with here today, municipal code sections 1950 through 1955, requires a view inspection by the city when the determination is made that a view impact occurs as to the affected residents. That is a requirement.

Now, if they have to do it, in order to go forward with the proceeding, which has the effect of ruling that these people can't build an addition to their house, because that inspection says there is an obstruction, your Honor is not looking at or re-weighing evidence. You are looking at the evidence which is already in the file.

You are looking at the view. You have pictures of it. You have testimony about it from the staff. You have their reports discussing it in great detail.

Exhibit J is the report where they go into great detail.

The Court: Of course, these improvements are not in place at the present time, are they; so you really can not determine what obstruction of view there is unless you depend upon architectural or engineering diagrams.

Isn't that what it really —

Ms. Butler: Or the pictures, your Honor; the pictures set forth — the first exhibit — in front of you, your Honor; Exhibit G.

If you look at the view corridor, you see a little spec of a man on top of the garage roof. When you look at Exhibit H and Exhibit I, you see that the man is holding a pole. At the top of that pole is a white structure, and the man is approximately six feet tall.

This is all before the council. It is in the Council records. Mr. Ross went into great detail, explaining the height of the proposed addition, which is approximately six feet above that white structure at the end of the pole.

That is the basis upon which you have a frame of reference, a drawing, a diagram, if you will, to make a decision as to whether or not you can't — whether or not the view from the Crawford and Larson houses is significantly obstructed.

Your Honor, I don't see why this is creating such a problem for opposing counsel.

The Court: I don't either. Whey shouldn't I —

Ms. Butler: What are they afraid of. Are they afraid that you are going to see something that you shouldn't see?

The Court: Why should I be limited to pictures? If I could get a better picture by going out there and looking at it myself, I very frequently do.

Mr. Terzian: For one thing, that is all the council had, your Honor. The Council looked at these pictures.

The Court: They only had the pictures?

Mr. Terzian: That's right.

Ms. Butler: But they had, your Honor, the benefit of the staff.

Mr. Terzian: I don't understand why we have to have more evidence. This is an administrative mandamus proceeding. Why are we admitting more evidence?

Ms. Butler: Because this is the crux of the whole proceeding, your Honor. The whole proceeding stems around whether or not these petitioner's proposed addition would obstruct someone's view.

The Court: Is it really new evidence, or is it in aid of an interpretation of evidence that was already before the administrative agency?

Ms. Butler: It is not new.

Mr. Terzian: Your Honor, I can't stop the court from going out there to take a look at that, if you want to. I am simply asking the court that, if it does, to so indicate on the record that it has done so.

I am not stipulating to it, because we have no way of knowing if the court is going to be standing in exactly the same place, and exactly at the same angle as —

The Court: And I would expect to meet you and all of the attorneys involved, and make sure that I am in the right place.

Ms. Butler: And the staff.

Mr. Terzian: Your Honor, I am not going to stipulate for additional evidence to be taken at this hearing. This is an administrative mandamus hearing.

The Court: And if I do it on my own, I do it at my peril. Then you can go up to the Court of Appeal and reverse me if I make the wrong decision.

Mr. Terzian: Certainly not at your peril, your Honor, but I do assume that the Court would advise us —

The Court: Oh, of course. I would want you to meet me there.

Ms. Butler: It is beautiful, your Honor. I am sure you know.

Now, just to cover a few more points before we leave the substantial evidence, you have before you the scenario, the history of the four proposals which were each given to the homeowners committee, which were each provided to the staff, and upon which two commission meetings were held, and two staff reports were prepared strenuously recommending that the proposed additions be granted by minute action, which was the last report.

The final staff report, which occurred after the commission meeting, basically said, "no. There is a violation of the View Protection Ordinance," at this point mirrors everything the commission said.

Our point in the papers is, Your Honor, that, while the final staff report, recommending against what they had earlier recommended, changes their recommendation, it is not based on anything new.

They had plenty of opportunity to meet with the Crawfords and the Larsons. They did that. They got all of their input. They knew everything it was going to say about and against the proposed addition; and with this in mind prepared a report, saying there is no significant obstruction and give these people that addition by minute action.

So counsel's argument that this came after the hearing, after hearing new evidence, is just wrong. We submit that the experts charged with making the evaluation of what constitutes a view obstruction and what does not is the

strongest evidence that has not been refuted by any other equally substantial evidence to support the denial of the building permit, and the refusal to grant the variance.

The Court: Here is what I have to contend with. As you will note, I have twenty matters on calendar here to be completed before twelve o'clock. There is another calendar this afternoon.

I know that it is important to your clients. It is important to you, and it is important to me, and I intend to re-read everything that you have submitted; so will you please just hit the high spots.

Ms. Butler: Well, Your Honor —

The Court: We have already used up an hour on this matter, and I am getting nervous. We have many, many other people waiting to be heard.

Ms. Butler: — In light of that, Your Honor, I think that what we have stated is that essentially the substantial evidence, even giving the city the benefit of the —

The Court: Well, you have already argued that at great length in your —

Ms. Butler: Then I will rest.

The Court: Okay; let's —

Ms. Butler: I am saying —

The Court: — Hear from the other side.

Ms. Butler: — That we have got it in our papers.

The Court: Okay, let's let the other side —

Ms. Butler: That's all.

The Court:— Let's hear from Mr. Terzian.

Mr. Terzian: Thank you.

As I was saying, I would be considerably brief, your Honor, because we have set forth everything we want to say in our written papers.

There are two issues here. I will turn to the first one, variance.

A variance application was heard by the Planning Commission on May 6, 1985, and denied. Under section 1898 of the municipal code, that can be appealed. There is an administrative remedy.

It can be appealed to the city council either by the applicant or by any person who believes they are the aggrieved person in the area, or the city council on its own motion can bring it up; but all —

The Court: She says they did.

Mr. Terzian: Well, I will get to that, your Honor.

It has to be done within twenty days. The fact that the city council can bring it up on its own motion simply makes the City Council one more entity, one more person that is entitled to bring it up; but it does not alter the time within which the appeal must be filed.

The Court: Do you mean the City Council must do it within the twenty days?

Mr. Terzian: The City Council must do it within the twenty day period, your Honor; and it was not until Ms. Butler made that argument for the first time that I was aware of the fact that the petitioner was taking the position that the Council allegedly on its own motion, during the course of the administrative appeal from the View Protection Ordinance denial, had suddenly converted it into a hearing of the appeal on the variance.

Well, that is not what the ordinance provides. It is not what the Council intended. It certainly does not appear

from the records; and most importantly, even if the council wanted to do that, the Council would not have the power to do that, because that would violate the due process rights of other people in the area who might object to a variance.

That is why the system is set into the ordinance. Council just cannot on its own motion, during the course of a hearing three or four or five months later, suddenly decide that they are going to hear a variance matter, where the notice has not been given to the surrounding neighborhood.

For all the neighbors knew, the variance matter was over because it has never been appealed.

So with respect to the variance, your Honor, clearly the petitioner, who was well aware of the fact that he was entitled to appeal, because the minutes of the planning commission meeting held on May 6, 1985, attached as Exhibit C to the moving papers, indicate that he was aware of it, and decided not to take an appeal.

Now, that means they have not exhausted their administrative remedy with respect to the variance, and the court has no jurisdiction.

Now, your Honor, turning to the view protection ordinance, they did in fact exhaust their administrative remedy in that respect.

The did take a timely appeal from the Planning Commission denial to the City Council. As the court is aware, we are dealing here not with a vested right, but with a type of matter under the administrative mandamus in which the substantial evidence rule applies.

As I pointed out, the court is essentially in the same position as an appellate court. What is the evicence? Well, it was conflicting.

Mr. Ross got up and said that the views are not obstructed. He had pictures indicating, in his view, that the views were not obstructed.

Evidence of the people who were most closely affected, the Crawfords and Larsons, was to the effect in their testimony that the view was impaired.

The staff reports indicated impairment unless mitigating measures were taken. Those mitigating measures, Mr. Ross was not willing to go along with.

We have cited all of the cases indicating that this is the kind of evidence that is more than substantial to sustain the determination of the — the evidence of the administrative agency in this type of proceeding.

What the petitioner wants is essentially what any disappointed litigant wants. They want this court to re-weigh the evidence; re-assess the credibility of the witnesses; to believe their evidence as opposed to the evidence that the other side put in, and come down with a new decision.

This court simply can not do that. It is limited to the administrative record.

Now, with respect to the constitutionality of the View Protection Ordinance, we have cited cases in our papers indicating that this type of ordinance, which the United States Supreme Court has upheld in the Boraas vs. Village of Belle Terre case, is the kind of ordinance that is essentially adjudged on the general welfare standard. Ordinances of this type have been upheld on far broader criteria than what we have here.

The court indicated in some comments to counsel during the course of her oral argument, "what is a view? how do you tell what a view is?"

Well, that has been done on a case by case basis, using the guidelines set forth in this ordinance. The opening

section of this ordinance, section 1950, talks about the hillside lots and the resulting views as being a great advantage to the city, a great natural resource, not only to Mr. Ross's neighbors, but to Mr. Ross himself.

Now, some of those views are of the ocean. Some are of the hill, and some of city lights. It all depends on the property. That is what the hearing is for, but the hearing is guided by the criteria that are set forth in section 1951. Those criteria are considerably more precise than the criteria in various ordinances that have been upheld in similar cases.

Now, this View Protection Ordinance is the kind of ordinance, which is as much for the petitioners' benefit — although he may not think so at the present time — as it is for the neighbors.

Under the circumstances, your Honor, in light of the record here the petition should be denied.

The Court: Do you want to briefly reply?

Ms. Butler: Your Honor, I neglected to make a motion to have the records admitted. I would like to do that at this time so that we don't run afoul of any evidentiary problem. Counsel and I have —

Mr. Terzian: No objection.

Ms. Butler: Discussed the admission being based upon numbers which respondents have submitted as their evidence.

The Court: All right; the record will be admitted as part of the petitioners' presentation in evidence.

Ms. Butler: I have nothing further to add, your Honor, and would welcome your reading all of the papers, and, also taking a view to see whether you can tell whether they exercised the correct discretion.

The Court: I can assure you that, before you have a decision from the court, I will have read everything that you have submitted; and if you find any authority that permits me to go out there and take a look myself, let me have it in the form of a letter.

If I do not hear from you; but if I find such authority myself, I will go, but I will let you know, and I will meet you there. Thank you very much for your assistance.

Mr. Terzian: Thank you.

Ms. Butler: Thank you, your Honor.

(Proceeding concluded at 10:25 a.m.)

NO. SWC 83320

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT SOUTHWEST J
HON. A. GORENFELD, JUDGE PRO TEM.

W. KENNETH ROSS and CAROLE A. ROSS,
Petitioners,

vs.

THE CITY OF ROLLING HILLS ESTATES, ETC., ET AL,
Respondents.

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

REPORTER'S TRANSCRIPT

I, Anne S. Motoyoshi, official reporter of the Superior Court of the State of California, for the County of Los Angeles, do hereby certify that the foregoing pages, 1 to 31 inclusive, comprise a true and correct transcript of the proceedings reported by me on Tuesday, April 1, 1986, in the above-entitled matter.

Dated this 26th day of September, 1986.

ANNE S. MOTOYOSHI
Official Reporter
CSR #1453

No. SWC 83320

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Respondents.

We hereby stipulate that the foregoing pages comprise a true and correct transcript of the designated record on appeal in the above-entitled matter.

Dated this day of , 1986.

_____
Attorney For Appellant

_____
Attorney for Respondent

JUDGE'S CERTIFICATE

I hereby certify that the foregoing transcript on appeal is true and correct, and the same is hereby settled, allowed, and made a part of the record in this case.

Dated this day of , 1986.

_____

Judge

No. SWC 83320

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COUNTY OF LOS ANGELES
CLERKS CERTIFICATE

Notice of completion of the reporter's transcript on appeal in the above-entitled matter having been mailed to the attorney, representing the appellant and respondent, and no request for correction of the transcript on appeal having been filed, and the time for said filing having expired;

Pursuant to Rule 8(A) of the California Rules of Court, I hereby certify that the foregoing record consisting of 31 pages is a true and correct transcript on appeal as designated by counsel.

Dated this day of , 1986.

Frank S. Zolin, County Clerk of the County of Los Angeles, State of California, and Clerk of the Superior Court of the State of California, for the County of Los Angeles.

By _____
Deputy

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On October 22, 1987, I served the within Jurisdictional Statement in re: "W. Kenneth Ross vs. the City of Rolling Hills" in the United States Supreme Court, October Term 1987, No. .....;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Richard R. Terzian
Adams Duque & Hazeltine
523 West Sixth Street
10th floor
Los Angeles, CA 90014

All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on October 22, 1987, at Los Angeles, California

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CE CE MEDINA

Supreme Court, U.S.
FILED
NOV 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

Case No. 87-658

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OF THE UNITED STATES

OCTOBER TERM, 1987

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Attorneys for Appellees

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MOTION TO DISMISS APPEAL

Appellees The City of Rolling Hills Estates, The Planning Commission of the City of Rolling Hills Estates and The City Council of the City of Rolling Hills Estates (hereinafter referred to collectively as "City"), pursuant to Rule 16 of the Rules of this Court, hereby move the Court for an Order dismissing the appeal from state court filed by appellants on the ground that the federal questions sought to be reviewed were not timely or properly raised and were not expressly passed on by the courts of the State of California.

This motion is based on the various pleadings, briefs and opinions of the courts of the State of California

attached as appendices to the Jurisdictional Statement filed by appellants and on the Statement of the Case and Legal Argument set forth herein.

ADAMS, DUQUE & HAZELTINE
RICHARD R. TERZIAN

By _____
Richard R. Terzian
Attorneys for
Appellees

I. STATEMENT OF THE CASE

On or about February 11, 1986, appellants filed a Petition for Writ of Mandamus with the Superior Court of the State of California pursuant to California Code of Civil Procedure Section 1094.5 challenging the action of the City in refusing to approve the building designs for a proposed addition to appellants' residence.

The appellants' petition alleged, among other things, that the City's View Protection Ordinance ("VPO"), pursuant to which the building design plans were disapproved, was "unconstitutionally vague and overbroad." (Appendix A to Appellants' Jurisdictional Statement, p.5a.)

On April 15, 1986, following a hearing, the Superior Court of the State

of California denied the Petition for Writ of Mandmus. As set forth in its Memorandum Opinion, the Superior Court refused to find the VPO "unconstitutional" on either ground of vagueness or an improper delegation of authority. (Appendix B to Appellants' Jurisdictional Statement, pp.5b-6b.)

Appellants appealed the decision of the Superior Court to the Court of Appeal of the State of California, Second Appellate District ("Court of Appeal"). That Court also upheld the validity of the VPO.

Although appellants made reference to an alleged violation of their rights under the Fifth Amendment to the U.S. Constitution in the next to the last sentence of their Reply Brief to the Court of Appeal (Appendix E to Appellants' Jurisdictional Statement, p.13e),

the Court of Appeal never expressly or impliedly addressed that federal question or any federal question. The Court of Appeal framed the issue of the validity of the VPO to be addressed by that court as follows:

> "Appellants' challenge to the ordinance asserts that due process is denied them because the ordinance language is unconstitutionally vague." (Appendix C to Appellants' Jurisdictional Statement, p.3c.)

In upholding the "constitutional" challenge to the VPO, the Court of Appeal relied solely on California case law and at no time made any reference to any provision of the U.S. Constitution. (Id., at pp.3c-7c.)

Appellants sought review of the Court of Appeal's decision by petition to the California Supreme Court for hearing. In that petition, appellants, for the first time, made reference to specific provisions of the U.S. Constitution allegedly violated by the VPO, namely, the Fifth and Fourteenth Amendments to the U.S. Constitution. (Appendix G to Appellants' Jurisdictional Statement, p.12g.) Significantly, these provisions were not cited in connection with the alleged unconstitutional vagueness of the VPO or the alleged improper delegation of authority under the VPO. Rather, appellants made reference to the provisions of the U.S. Constitution in connection with their newly posited theory that the application of the VPO to appellants' property constitutes an

unconstitutional "taking" of their property without just compensation. (Id.)

The California Supreme Court denied appellants' Petition for Hearing and, thus, never addressed the merits of appellants' Petition. Consequently, appellants filed an appeal to this Court from the Court of Appeal of California, the highest state court to render a decision on the merits of appellants' claim.

II. ARGUMENT

Appellants seek review in this Court under 28 U.S.C. Section 1257(2) which states:

> "Final judgments or decrees rendered by the highest court of

a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . .

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The questions presented for review in appellants' Jurisdictional Statement are as follows:

1. Has California Permitted the City of Rolling Hills Estates, California To Violate Appellants' Federal Due Process Rights By Holding

That The View Protection ordinance Is Constitutional?

2. Have Appellants' Federal Due Process Rights Under The Fifth And Fourteenth Amendments To The U.S. Constitution Been Violated By The View Protection Ordinance's Improper Delegation Of Authority?

3. When Local Government Regulates Private Property In Such A Way As To Substantially Decrease The Use To Be Made Of And The Value Of The Private Property, Has The Property Been Taken Within The Meaning Of The Fifth and Fourteenth Amendments To The U.S. Constitution? (Appellants' Jurisdictional Statement, p.i.)

The following demonstrates that appellants failed to timely and properly raise any of the foregoing federal questions in the California Court of

Appeal, and further, that the Court of Appeal did not, impliedly or expressly, pass on any of these questions.

A. Alleged Invalidity Of The VPO On Grounds Of Vagueness Under The Due Process Clause Of The Fourteenth Amendment To The U.S. Constitution.

Appellants' claim that the question of the validity of the VPO under the Due Process Clause of the U.S. Constitution was properly and timely raised and passed upon by the Court of Appeal has no merit.

By its own terms, 28 U.S.C. §1257(2) requires that the federal question or questions sought to be reviewed by this Court be "drawn into question" in the state courts.

"There are various ways in which the validity of a state statute may be drawn into question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is regarded as having been adequately presented. (Footnote omitted.)" (New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67, 73 L.Ed. 184, 49 S.Ct. 61 (1928).)

This Court in Zimmerman also stated that where it is not clear whether the claim of invalidity is founded on some provision of the state constitution or the federal constitution or both, there is "plainly...no basis for review in this Court." (Id.)

In the instant case, appellants' Petition for Writ of Mandamus makes absolutely no reference to any provision of the U.S. Constitution upon which the claim of invalidity of the VPO is based. Similarly, the trial court memorandum opinion makes no reference to any federal constitutional provision.

Moreover, the Court of Appeal opinion from which this appeal is taken makes absolutely no reference to a federal constitutional provision. That opinion refers only to appellants' claim

that the VPO is unconstitutionally vague, and states that such a challenge brings into question whether the first essential of due process of law has been violated. (Appendix C to Appellants' Jurisdictional Statement, pp.6b-6c.) In upholding validity of the VPO, the Court of Appeal relied solely on California case law.

Thus, it is not clear whether appellants' claim of invalidity of the VPO is based upon a violation of the California Constitution[1/] or the U.S. Constitution or both. Under the Zimmerman case, there is plainly no

---

1/ Article 1, § 7(a) of the California Constitution states in relevant part:

> "A person may not be deprived of life, liberty, or property without due process of law. . . ."

basis for review of this issue by this Court.

In Bowe v. Scott, 233 U.S. 658, 58 L.Ed. 1141, 34 S.Ct. 769 (1914), a case directly on point, this Court held that an allegation that a city ordinance denied the plaintiffs of their rights without due process of law was insufficient to raise a federal question which could be reviewed by this Court, stating:

> "It is settled that such an averment making no reference to the Constitution of the United States and asserting no express rights thereunder is solely referable to the State Constitution, which in this instance has a due process clause, and affords no basis whatever for

invoking the jurisdiction of this court." (233 U.S. at 665.)

Based upon the foregoing authority, the federal question regarding the validity of the VPO under the due process clause of the Fourteenth Amendment to the U.S. Constitution has never been properly or timely raised in the state courts or passed on, either expressly or impliedly by the California Courts and, consequently, does not fall within this Court's jurisdiction under 28 U.S.C. §1257(2).

B. Alleged Invalidity Of VPO Based Upon An Improper Delegation Of Authority.

Nowhere in Appellants' Petition for Writ of Mandamus is there any claim that

the VPO constitutes an improper delegation of authority. Although appellants make this argument in their Memorandum of Points and Authorities in Support of their Petition for Writ of Mandamus (Appendix A to Jurisdictional Statement, p.33a), they fail to point to any provision in the federal constitution which they claim has been violated by the alleged delegation of authority.

Nowhere in the opinion of the Court of Appeal is there any reference to any claim of an improper delegation of authority which violates the United States Constitution. Again, a vague argument relating to the improper delegation of authority is set forth in appellants' Opening Brief to the Court of Appeal (Appendix D to Jurisdictional Statement, p.10d), but no reference is made to any provision of the U.S. Con-

stitution which is violated by the alleged improper delegation of authority.

In short, the federal question relating to an alleged violation of appellants' rights under the Fifth and Fourteenth Amendments to the U.S. Constitution was never properly raised in the state courts even under the broad Zimmerman standard and was never passed on by the Court of Appeal. Accordingly, this Court has no jurisdiction over this issue.

C. Alleged Invalidity Of The VPO Based Upon An Unconstitutional Taking Of Appellants' Property.

Appellants seek review of the issue

of whether the application of the VPO to the appellants' property constitutes an unconstitutional "taking" of their property without just compensation.

The first time this federal question was ever raised in the state courts was in the second to the last sentence of appellants' Reply Brief filed in the Court of Appeal. (Appendix E to Appellants' Jurisdictional Statement, p.13e.)

It is settled law in California that points or issues raised for the first time in a reply brief on appeal will not be considered. (Malmstrom v. Kaiser Aluminum & Chemical Corp., 187 Cal.App.3d 299, 320, 231 Cal.Rptr. 280 (1986).) An exception to this rule may be allowed if good cause is shown for failure to present the points or issues earlier. (In re Marriage of Nolte, 191

Cal.App.3d 966, 975, 236 Cal.Rptr. 706 (1987).) Nowhere in the record before this Court is there any indication that appellants' demonstrated "good cause" for not raising the "taking" issue before they filed their Reply Brief in the Court of Appeal. Having failed to do so, the State Court had no legal authority to, and in fact did not, pass on the question of whether the Fifth and Fourteenth Amendments to the U.S. Constitution are violated by application of the VPO to appellants' property under the Fifth and Fourteenth Amendments to the U.S. Constitution.

This Court has held that:

> "when...the highest state court has failed to pass upon a federal question it will be assumed that the omission was

> due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show to the contrary." (Street v. New York, 394 U.S. 576, 579, 22 L.Ed.2d 572, 89 S.Ct. 1354 (1969).)

Appellants utterly and completely failed to meet this burden of proof with respect to the "taking" issue. Therefore, this federal question is not properly before this Court.

III. CONCLUSION

Based upon the foregoing, appellees respectfully request that this Court grant their motion to dismiss the appeal for want of jurisdiction.

Dated: November ___, 1987

Respectfully submitted,

ADAMS, DUQUE & HAZELTINE
RICHARD R. TERZIAN

By _____
Richard R. Terzian
Attorneys for
Appellees

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I, La Venia Williams, declare:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 523 West Sixth Street, Los Angeles, California 90014.

On November 20, 1987, I served the foregoing document described as Motion to Dismiss Appeal From State Court on the interest parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

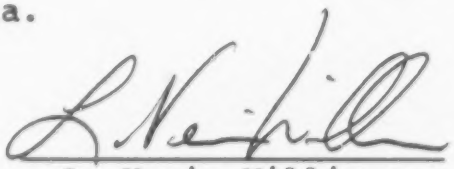
Weisman, Butler & Watson
Laurie J. Butler
9777 Wilshire Boulevard
Suite 600
Beverly Hills, CA 90212

I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California.

I declare under penalty of prejury under the laws of the State of California that the foregoing is true and correct.

I declare that I am employed in the office of a member of the bar of this Court at whose direction service was made.

Executed on November 20, 1987 at Los Angeles, California.



La Venia Williams

Supreme Court, U.S.
FILED
DEC 3 1987
JOSEPH F. SPANIOL, JR.
CLERK

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Pacesetter Homes, Inc. v. Village of Olympia Fields, 244 N.E.2d 369 (App.Ct. Ill. 1968)	1
Radice v. New York (1924) 264 U.S. 292	2
Street v. N.Y. (1969) 394 U.S. 576	2

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

I. APPELLANTS HAVE SUFFICIENTLY AND PROPERLY RAISED A FEDERAL QUESTION

Appellants have argued implicitly and explicitly in every California court that the VPO violates their federal and state constitutional due process rights. Appellants rely heavily upon Pacesetter Homes, Inc. v. Village of Olympia Fields, 244 N.E.2d 369 (App.Ct. Ill. 1968) to underscore their dual constitutional attack on the VPO. That case found a municipal ordinance unconstitutional on both state and federal constitutional grounds. Heavy reliance upon a case involving state and federal constitutional rights resulted in this

Court's finding federal jurisdiction in New York ex rel. Bryant v. Zimmerman (1928) 278 U.S. 63, the holding of which finds authority in Radice v. New York (1924) 264 U.S. 292, 296, 297. Id. at 69.

This court has the sole power to decide whether a federal question has been presented, whether the highest state court has passed upon such federal question and, if such high court has not passed upon same, whether this omission was due solely to the manner of presentation of such federal question, or to other circumstances. Street v. N.Y. (1969) 394 U.S. 576, 581-582.

Appellants will not repeat the many references in the record where the federal question was raised. They are clearly set forth. [Jurisdictional

Statement, pp. 3-4] Appellants will reiterate, however, that only a few months after the two U.S. Supreme Court cases voiding California's practice of refusing to acknowledge a governmental taking through regulation were handed down, appellants extensively briefed and argued this issue to California's highest court. [Jurisdictional Statement, App. G]

Specific authority for this federal question could not have been raised any earlier, and yet it was! Even before this Court ruled in Nollan v. California Coastal Commission (1987) 483 U.S. ____, 97 L.Ed.2d 677, and First English Evangelical Lutheran Church of Glendale v. L.A. County (1987) 483 U.S. ____, 96 L.Ed.2d 250, appellants cited the Nollan case. [Jurisdictional Statement, App.E,

p. 13] Appellants were clearly relying on federal constitutional law before the Court of Appeal.

New York ex rel. Bryant v. Zimmerman presented the question of when and how a federal question must be raised in a state court to qualify for federal review. The standards which should be applied in determining whether to exercise federal jurisdiction were described as follows:

> "No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time."
>
> Id. at 278 U.S. 67.

Respondents' claim of want of proper

presentation in the state court is incorrect. The California Supreme Court denied appellants' petition for review for reasons other than any alleged want of presentation. [Jurisdictional Statement, App. H] Since Agins v. City of Tiburon (1979) 24 Cal.3d 266, aff'd. on other grounds (1980) 447 U.S. 225, overruled in First English, supra, no California court would permit recovery on the federal taking issue appellants have raised. California had set up an insurmountable barrier to raising the instant federal question, yet appellants raised it both before and after this Court ruled that Agins was in violation of the federal constitution.

Eddings v. Oklahoma (1982) 455 U.S. 104, lends further support to a finding of federal jurisdiction. In Eddings, a

youth seeking reversal of a state court murder conviction and death penalty sentence failed to raise the necessary federal question in his state court appeal. The state criminal appellate court also failed to mention the relevant federal authority in affirming the conviction. Id. at 114. This Court found federal jurisdiction by ruling that the Oklahoma Court's failure to follow federal law mandated federal review. Quoting New York ex rel. Bryant v. Zimmerman, "Our jurisdiction does not depend on citation to book and verse." Id.

In this case, if Nollan and First English stand for the proposition that the law stated therein has always been the law of this country, the California courts committed the same violation of

their duties to uphold such law as did the Oklahoma courts in Eddings. Such error justifies this Court in finding federal jurisdiction.

II. APPELLANTS' FEDERAL QUESTION CLAIMS WERE PROPERLY AND TIMELY RAISED UNDER CALIFORNIA LAW

In Meier v. Ross General Hospital (1968) 69 Cal.2d. 420, the California Supreme Court stated:

> The Court of Appeal declined to consider this determinative issue on appeal because the plaintiffs, having failed to raise the point in their opening brief, could not do so later without "good reason." [citations omitted] During the course of this litigation the case of Vistica

v. Presbyerian Hospital, supra, 67 Cal.2d 465, proceeded through the courts. On October 10, 1967, three and one-half months after the plaintiffs had filed their closing brief, the Supreme Court decided Vistica; that decision decisively affected the proper disposition of the present case. Thereafter plaintiffs sought and obtained permission to file a supplemental brief and defendants responded by letter.

The circumstances outlined above provide a satisfactory basis for the unusual practice of considering a point raised for the first time after the

opening briefs have been filed.

Id. at 423-24, n.1

To the same effect is California Nat. Supply Co. v. O'Brien (1921) 51 Cal.App. 606, 612, wherein the challenged late-raised issues were adjudged sufficient and timely based on the fact that a new case came down after the opening briefs were submitted.

Appellants met the duties required of them by California law to preserve the federal question on appeal. All authorities cited by respondents to the contrary are inapposite because this case is unique due to the rulings in Nollan and First English. Fairness demands that appellants be given the treatment on this motion that New York ex rel. Bryant v. Zimmerman and Eddings require.

III. CONCLUSION

For the reasons advanced herein, federal jurisdiction should be found by this Court and respondents' motion to dismiss should be denied.

Dated: December 2, 1987

Respectfully submitted,

WEISMAN, BUTLER & WATSON
LAURIE J. BUTLER

By Laurie J. Butler
Laurie J. Butler,
Attorneys for
Appellants

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 9777 Wilshire Boulevard, Suite 600, Beverly Hills, California 90212.

On December 2, 1987, I served the within Brief In Opposition To Motion To Dismiss Appeal From State Court in re: "W. Kenneth Ross vs. the City of Rolling Hills" in the United States Supreme Court, October Term 1987, No. 87658;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Beverly Hills, California, addressed as follows:

Richard R. Terzian
Adams Duque & Hazeltine
523 West Sixth Street
10th floor
Los Angeles, CA 90014

All parties required to be served have been served.

I declare under penalty of perjury, that the foregoing is true and correct.

Executed on December 2, 1987, at Beverly Hills, California.

Faith Ortega

FAITH ORTEGA